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Chapter 20: Education Law

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C H A P T E R 2 0

Education Law

STEPHEN F. ROACH

§20.1. **General.** This chapter will consist of three parts, relating to legislation, court decisions, and opinions of the Attorney General, as these sources of law were concerned with educational activities within the Commonwealth during the 1965 SURVEY year.

For editorial convenience, all significant court decisions and Attorney General opinions which were handed down between the dates September 1, 1964, and August 31, 1965, inclusive, and became available, are included. All acts and resolves of the General Court which were approved during the 1965 regular session through August 31, 1965, are also included. Acts and resolves relating to education which were approved after August 31, 1965, will be reported in the next ANNUAL SURVEY.

No attempt has been made to consider administrative decisions, or rules and regulations, of the State Board of Education or the State Department of Education.

A. LEGISLATION

§20.2. **Reorganization of state educational system.** Two enactments of the 1965 legislature may well serve as landmarks for education. Each was clearly influenced by an exhaustive study made by citizen groups and presented to the General Court¹ and the State Board of Education² respectively.

Chapter 572 of the Acts of 1965 established a 13-member Board of Education. The act assigned as the general purposes of the Board "to support, serve and plan" general education in the public schools; authorized the Board to establish or approve the length for the school day and year, the educational standards for the appointment of professional personnel in the public schools, the maximum pupil-teacher ratios for

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§20.2 ¹Quality Education for Massachusetts, Summary Report of the Special Commission Relative to Improving and Extending Educational Facilities in the Commonwealth, December, 1964. See full reports in House Nos. 3300, 3301 (1965).

²Because It Is Right—Educationally, Report of the Massachusetts Advisory Committee on Racial Imbalance and Education (Mass. Dept. of Education, April, 1965).

school classes, the ages for school attendance, the minimum educational standards for all public school courses, and the minimum standards for all public school buildings; charged the Board with evaluating, annually, the efficacy of the state aid formula; and authorized the Board to withhold state and federal funds from local school committees which fail to comply with the provisions of law relative to the operation of the public schools. Chapter 572 also: (1) established the position of Commissioner of Education as the chief state school officer for elementary and secondary education; (2) established the positions of Deputy Commissioner, Associate Commissioner, and Assistant Commissioner; and (3) organized the State Department of Education into five divisions: (a) curriculum and instruction, (b) administration and personnel, (c) research and development, (d) school facilities and related services, and (e) state and federal assistance.

In addition, Chapter 572 established an 11-member Board of Higher Education. The act assigned as the general purposes of this Board "to support, facilitate, and delineate functions and programs for public institutions . . . of higher education . . . to plan and develop efficient and effective coordination among them . . . and to promote the best interests of all higher education" throughout the Commonwealth. The position of Chancellor of the Board of Higher Education was established as its chief executive officer.

Chapter 572 further established a 9-member advisory Council on Education and assigned as the general purposes of the Council "to recommend policies designed to improve the performance of all public educational systems" in the Commonwealth. It established the position of Director of Research to be the Council's executive secretary.

Finally, Chapter 572 set out various provisions relating to the governance and supervision of the university, the state colleges, the regional community colleges, the technological institutes, and the regulation of school attendance.

§20.3. Racial imbalance. Chapter 641 of the Acts of 1965 provided for the elimination of racial imbalance in the public schools of the Commonwealth. This is believed to be the first such state-wide statute in the nation.

The statute, which added Sections 1I through 1K to General Laws, Chapter 15, and Sections 37C and 37D to General Laws, Chapter 71, declared it to be state policy to encourage all school committees to adopt as educational objectives "the promotion of racial balance and the correction of existing racial imbalance in the schools. The prevention or elimination of racial imbalance shall be an objective in all decisions involving the drawing or altering of school attendance lines and the selection of new school sites."

The term "racial imbalance" was to refer to "a ratio between non-white and other students in public schools which is sharply out of balance with the racial composition of the society in which non-white children study, serve and work." Racial imbalance would be deemed to

exist "when the per cent of non-white students in any public school is in excess of fifty per cent of the total number of students in such school."

The statute requires that: (1) each school committee submit an annual racial census for each of its schools; (2) each school committee involved be notified if the State Board of Education finds racial imbalance to exist in one of its schools; and (3) each such school committee "thereupon prepare a plan to eliminate such racial imbalance" and file a copy with the State Board. Plans must detail the methods to be employed, and are to include proposed changes in existing school attendance districts, locations of proposed school sites, proposed additions to existing buildings and sites, and projections of expected racial composition of all schools.

Any plan must also "take into consideration . . . the safety of the children involved in travelling" between home and school. A plan might provide for "voluntary cooperation" by other communities; but no school committee "shall be required . . . to transport any pupil to any school outside its jurisdiction or to any school outside the school [attendance] district established for his neighborhood" if the parent objects.

When a school committee "does not show progress within a reasonable time in eliminating racial imbalance in its schools," the Commissioner of Education is not to certify the community for state aid, nor is the School Building Assistance Commission to approve any project for school construction for the community. But, when the State Board of Education "is satisfied that the construction or enlargement of a schoolhouse is for the purpose of reducing or eliminating racial imbalance" the amounts of grants for construction are to be increased from the present 40 per cent to 65 per cent of the approved cost. Procedures for judicial review and enforcement are also specified.

Finally, the statute requires that an Advisory Committee of Racial Imbalance be appointed by the State Board of Education, but that no individual be appointed thereto "who has been listed in any state or federal document as being a member of a communist front organization."

On August 17, 1965, in reply to questions raised by the Governor as to the constitutionality of Chapter 641 and as to whether the entire Chapter would be affected should a given provision prove to be unconstitutional, the Attorney General gave as his opinion that there "can be no question that [all] the provisions [excepting the final paragraph, which provided for the Advisory Committee] are valid enactments . . . completely in accord with both the Federal and the State Constitutions."

With regard to the provision relating to the Advisory Committee — and particularly with the prohibition of the appointment thereto of any person "who has been listed in any state or federal document as being a member of a communist front organization" — the Attorney General advised:

It was obviously the purpose of the General Court to prohibit the appointment of Communist Party members and sympathizers to the . . . Advisory Committee. . . . It is not the decision to bar Communists . . . but the means by which this decision is to be implemented, which must be examined. . . . The fact that a person has been listed in a governmental document as a member of a Communist front organization is, in my opinion, far from an effective guide to a determination whether such a person is in fact a Communist or a Communist sympathizer. It is clear that if such a standard is used both Communists and non-Communists could be barred from the Advisory Committee. Thus the legislature will have created an arbitrary distinction between non-Communists who happen to have been mentioned in a governmental document as members of Communist front organizations and non-Communists who have not been so mentioned. As such, the provision represents an unreasonable legislative classification which denies to certain persons the rights which are enjoyed by others in the same category. It is my considered opinion, therefore, that the provision in question contravenes the "equal protection" clause of the Fourteenth Amendment to the Constitution of the United States, and is . . . an invalid and ineffective exercise of legislative authority.

The Attorney General concluded: "Accordingly, it is my opinion that the unconstitutional portion of the last paragraph of the Act may be severed from the remainder, and that — despite the invalidity of this provision — the measure as a whole will, upon [gubernatorial] approval, be fully effective."

§20.4. **Other legislation.** Other general acts¹ of the regular session of the 1965 legislature have significance to education. General Laws, Chapter 31, governing civil service, was amended by Acts of 1965, Chapter 157. Section 4A was added to the chapter. The new section provides that when a new regional vocational school committee votes to accept the provisions of the section, all nonacademic positions in the regional or regional vocational school district are made subject to the civil service law and rules "whether or not the municipalities comprising the district have accepted the provisions of this chapter."

Lists of eligibles shall be established on the basis of the school districts. Applicants for positions are required to "have been domiciled in a city or town comprising the . . . district" in which they seek service for six months prior to filing application.

Section 5 of General Laws, Chapter 40, was amended to authorize a city or town to appropriate money to provide indemnity insurance for "any teacher in its employ, as provided under section 100C, chapter 41, against loss by reason of any damages or expenses under said section."² Under General Laws, Chapter 41, Section 100C, a city, town, or re-

§20.4. ¹ Enactments through Acts of 1965, c. 673 (approved August 31, 1965), were reviewed for this section.

² Acts of 1965, c. 179.

gional school district, acting by its school committee, "shall . . . indemnify" a teacher in its employ, in certain cases, for expenses or damages sustained by him by reason of an action or claim for acts done by him while acting as a teacher.

General Laws, Chapter 71, governing public schools, was extensively amended during the 1965 SURVEY year. Section 16 was amended to add to the powers and duties of regional school districts the authority to incur debt "for the purpose of constructing sewerage systems and sewerage treatment and disposal facilities, or for the purchase or use of such systems with municipalities."³

Section 34C was repealed. This law had authorized the granting of high school diplomas to certain students who entered the armed services of the United States.⁴

Section 38 was amended to authorize school committees to hire "instructional or administrative aides" for assignments in laboratories and classrooms. An instructional or administrative aide is defined as "a person who does no actual teaching, but acts as an assistant to a teacher."⁵

Section 38G was amended to add "teaching and administrative interns from an institution of higher learning in the commonwealth" to those persons exempted from meeting the statutory certification requirements, provided approval for the employment of such personnel is granted by the State Department of Education. A teaching or administrative intern is defined as "a student who has completed his practice teacher requirements and seeks additional experience in part time teaching or administrative positions."⁶ Section 38G was also amended to authorize the certification of a noncitizen, otherwise qualified, for the purpose of teaching "only the language of his country of origin," provided he was legally present in the United States and presents a declaration of his intention to become a United States citizen. Such certification is to be valid for six years and is not renewable. Service by these noncitizen teachers is not to be counted toward tenure status.⁷

Section 38H was added to provide that every school librarian and school library supervisor or co-ordinator appointed by a school committee "shall acquire tenure in the school system of the city or town in which he is employed." The acquisition of this tenure is to be subject to the provisions of Section 41, which grants tenure upon re-election after service in a public school system for the three previous consecutive school years, and of Sections 42 and 43A, which relate to dismissal, suspension and discharge, and appeals therefrom.⁸ Section 41 also authorizes a school committee to grant tenure to "a teacher who has served in its school for not less than one school year."

Section 46 was amended to add a requirement that the school com-

³ Id., c. 367.

⁴ Id., c. 43.

⁵ Id., c. 164.

⁶ Id., c. 172.

⁷ Id., c. 345.

⁸ Id., c. 276.

mittee shall have administered, annually, "an aptitude test" to every child under its control who is between the ages of seven and sixteen and "who has been ascertained to be mentally retarded."⁹ The determination as to a child's mental retardation is to be carried out under regulations to be prescribed by the State Departments of Education and Mental Health.

Section 69A was added to permit the placing on public school buildings, "in a conspicuous location," a plaque containing the words "For God and Country."¹⁰

Section 71A was added to authorize school committees to designate locations for the erection of "highway safety stations" for children awaiting a school bus, provided each location has been approved by the school superintendent or, as his designee, the school transportation officer. A school committee is also authorized to discontinue the use of any such station if it is not constructed of "durable material with a floor of concrete raised above ground level," or if it is not kept clean, well painted, free of snow, and suitably maintained.¹¹

Other sections of the General Laws were also amended in matters that pertain to education. Section 7A of General Laws, Chapter 90, was amended to require the Registrar of Motor Vehicles to formulate and enforce rules and regulations providing for the inspection of "those school buses not subject to the jurisdiction of the department of public utilities," during the first week of the months of January, March, May, September, and November each year. This inspection is to be in addition to the previously required semiannual periodic inspection between April 1-May 15 and between September 1-October 15.¹²

Section 10G was added to General Laws, Chapter 147, to permit the Commissioner of Public Safety, upon request, to appoint as special police officers employees of colleges, universities, or other educational institutions.¹³

Section 11A of General Laws, Chapter 159A, was amended to place school service bus permits and operations under the supervision of the Department of Public Utilities and to permit the use of contract school buses in transporting pupils to and from school-sponsored extracurricular activities.¹⁴

Among other 1965 enactments relating to education generally were the following chapters of the Acts of 1965: Chapter 34 clarified the licensing of correspondence school salesmen; Chapter 132 related to the appointment of blind teachers; Chapter 171 provided that fraternity houses and dormitories of educational institutions are to be subject to the laws regulating lodging houses; Chapter 244 regulated the passing by motor vehicles of certain "camp buses" which have

⁹ *Id.*, c. 221.

¹⁰ *Id.*, c. 502.

¹¹ *Id.*, c. 404.

¹² *Id.*, c. 71.

¹³ *Id.*, c. 565.

¹⁴ *Id.*, c. 537.

stopped on highways to pick up or discharge passengers; Chapter 610 pertained to qualifications and training programs for food service personnel in public schools.¹⁵

Of interest to education generally, Chapters 11 and 50 of the Resolves of 1965 continued and increased the scope of the Special Commission to investigate relative to retarded children and training facilities therefor.

B. COURT DECISIONS

§20.5. **Bible reading in public schools.** The petitioners sought a writ of mandamus, in *Waite v. School Committee of Newton*,¹ to compel several school committees to comply with General Laws, Chapter 71, Section 31, under which it was required that a "portion of the Bible shall be read daily in the public schools, without written note or oral comment." The Supreme Judicial Court in rescript referred to its 1964 decision in *Attorney General v. School Committee of North Brookfield*² as controlling. In this earlier ruling the statute had been held unconstitutional and void on the authority of *School District of Abington Township v. Schempp*,³ in a decision of a single Justice, affirmed by the full Court.⁴

§20.6. **Determination of lowest bidder.** In *Builders Realty Corp. of Mass. v. City of Newton*¹ the city had publicly invited sealed proposals for the construction of an addition to the Lincoln-Eliot School, in accordance with certain plans and specifications and subject to existing statutes.² The invitation provided that proposals would be received until a specified time at the office of the city's purchasing agent, at which time the proposals would be publicly opened and read. The invitation also provided that the proposals be submitted in duplicate, with one copy to be deposited with the purchasing agent and the other with the comptroller of accounts. A document issued by the city, entitled "Information for Bidders," as well as a provision of the Newton revised ordinances, also stated that copies of bids should be submitted to the comptroller of accounts.

¹⁵ Special Acts were also enacted which involved particular aspects of educational operations in the following towns, cities, counties, regional school districts, and institutions of higher learning: Athol, c. 555; Attleboro, c. 147; Auburn, c. 82; Barre, c. 543; Blackstone Valley Vocational Regional, c. 144; Boston, cc. 182, 208, 215, 388, 391; Boston University, c. 559; Bridgewater State College, c. 461; Danvers, c. 152; Dracut, cc. 2, 359; Dunstable, c. 359; Fitchburg, c. 543; Franklin, c. 161; Franklin County, c. 555; Gardner, c. 543; Longmeadow, c. 139; Lowell, c. 359; Ludlow, c. 75; Monson, c. 614; Northbridge, c. 144; Norwood, cc. 15, 175; Pepperell, c. 359; Quincy, c. 372; Reading, c. 14; Royalsen, c. 543; Somerville, cc. 126, 217; Springfield, c. 376; Sterling, c. 543; Tyngsborough, c. 359; University of Massachusetts, c. 388; Wilmington, c. 89.

§20.5. ¹ 1964 Mass. Adv. Sh. 1259, 202 N.E.2d 297.

² 347 Mass. 775, 199 N.E.2d 553 (1964).

³ 374 U.S. 203, 83 Sup. Ct. 1560, 10 L. Ed. 2d 844 (1963).

⁴ 347 Mass. 775, 199 N.E.2d 553 (1964).

§20.6. ¹ 1964 Mass. Adv. Sh. 1191, 201 N.E.2d 825.

² G.L., c. 149, §§44A-44L.

Prior to the time specified for the public opening of the bids, Builders Realty Corp. and Rocheford Construction Co., among others, had filed bids at the office of the purchasing agent. However, of the two mentioned bidders, only Rocheford had filed a copy of its bid with the comptroller of accounts. When the bids were opened, Builders' bid (\$237,343) was lowest, with Rocheford (\$240,800) next. Both bids were in proper form and in all respects conformed to the applicable statutes, and both bidders were in all respects competent to perform the contract.

Three days after the opening of the bids, Builders Realty was notified that its bid had been rejected because no copy had been filed with the comptroller of accounts as required by ordinance and as stated in the bidding documents. Thereupon, Builders brought suit for a determination whether it or Rocheford was the lowest responsible and eligible bidder for the construction. Builders contended, primarily, that the requirements of the Newton ordinance were contrary to the provisions and intent of the applicable statutes.³

Section 2.14 of the Newton ordinances provided:

Whenever, in response to any advertisement under the preceding section [for a contract where the amount involved is \$1000 or more] by any officer or board of the city, a bid . . . is sent or delivered to the officer or board, a duplicate of the [bid] shall be furnished by the bidder to the comptroller of accounts, to be kept by him and not opened until after the original bids are opened. After the original bids are opened, the comptroller of accounts shall open and examine the bids submitted to him, and shall compare the same with the original bids. In case [of discrepancies] those submitted to the comptroller of accounts shall be treated as the original bids. The contract shall not be awarded until after both sets of bids are opened.

In holding that the city of Newton could properly reject Builders' bid, the Massachusetts Supreme Judicial Court made the following significant comments:

The purpose of the ordinance undoubtedly is to furnish a safeguard against collusion in the opening and reading of bids. . . . It does not follow, however, that that part of the ordinance should be upheld which, in the event of a difference between them, invalidates the original [bid] in favor of the copy. The original must be publicly opened under G.L. c. 149, §44F. The copy need not be publicly opened under . . . the ordinances. . . . But, wholly apart from the ordinance . . . there is no reason in the law of contracts why the city could not include in its offer to contract a requirement that a copy of a bid be filed with the comptroller of accounts. . . .

There is nothing illegal in the requirement. There is nothing in

³ *Ibid.*

G.L. c. 149, §§44A-44L, . . . which limits to the statutory minimum the amount of reasonable protection which a unit [of government] may have. . . . We see no reason why [Builders Realty], which either did not carefully read the bidding documents or purposely disregarded this stipulation, should be helped in this equitable proceeding.⁴

§20.7. Suit against school committee members: "Eliminated salary increase." In *Powers v. Spinner*¹ the plaintiff, a teacher employed in the Westford public schools, brought suit against five members of the Westford School Committee, individually, to recover salary increases which the Committee had voted for 1963. A majority of the Committee — made up of the five members here being sued by Powers — later voted to "eliminate" from the school budget the funds necessary to pay the salary increases.

The Massachusetts Supreme Judicial Court rejected Powers' contention with the comment: "We need not now consider what power the school committee possesses to rescind previously voted salary increases."² In substantiation, the Court cited earlier cases decided in 1937, 1944, 1952, and 1961 which, it considered, had established this point. The Court also noted that a town, rather than the school committee or its individual members, would be liable for teachers' salaries which have been established by a nonrescinded vote of the school committee.³

§20.8. Sick leave with pay: Entitlement. The plaintiff in *Yankun v. City of Boston*,¹ who had been employed by the city as an elementary schoolteacher since 1949, filed with the city's Superintendent of Schools in 1951 and 1954 a report "relative to [her] freedom from tuberculosis in a communicable form." In 1957, however, she filed no such report although, at that time, an existing statute required that every schoolteacher "at least every three years . . . file . . . a report, made by a registered physician, relative to his freedom from tuberculosis in a communicable form . . . [together with] an X-ray. . . ."² In case of question the statute provided for further X-rays and evaluation of them and went on to provide: "Cases in which the question of communicability of tuberculosis arises may on appeal be referred to a board of . . . physicians . . . and their decision shall be final."

In 1957 although Yankun did not file the required report, she did have chest X-rays taken from which a diagnosis of "pulmonary tuberculosis, minimal, questionably active" was made. She was given an ap-

⁴ 1964 Mass. Adv. Sh. 1191, 1193-1194, 201 N.E.2d 825, 826-827.

§20.7. ¹ 1964 Mass. Adv. Sh. 1261, 202 N.E.2d 246.

² Id. at 1261-1262, 202 N.E.2d at 246. See G.L., c. 71, §43, prior to amendment by Acts of 1963, c. 466, §4.

³ G.L., c. 71, §38.

§20.8. ¹ 1964 Mass. Adv. Sh. 1229, 202 N.E.2d 253.

² G.L., c. 71, §55B, as it read on the applicable dates in 1957.

pointment for a test to be given on June 25, 1957, to determine activity, which she did not keep. Instead, she placed herself under the care of a private physician who advised her on June 24, 1957, to have no further contact with children because she had a communicable form of active pulmonary tuberculosis.

From June 24, 1957, until April 28, 1958, she remained at home under treatment of the private physician who, on three separate occasions during this period of convalescence notified Yankun's school Principal by letter that she was unable to work because of illness, the nature of which he did not disclose. The Principal, whom Yankun had orally informed that she had communicable tuberculosis, transmitted the physician's letters to the Superintendent of Schools but did not inform the latter of the nature of Yankun's illness. On May 1, 1958, after being certified free from communicable tuberculosis, Yankun returned to work as a teacher.

During her absence, she had received sick leave pay, with 1/400 of her annual salary being deducted for each day of absence. But upon learning that the applicable statute provided, in her case, for sick leave *with pay*, Yankun, on May 25, 1961, asserted her claim for back wages. This claim was approved by the School Committee. Upon the refusal of the city to pay the claim, Yankun brought suit. From a Superior Court decree which in effect disallowed her claim, she appealed to the Supreme Judicial Court.

In affirming the lower court decree, the Supreme Judicial Court found that the plaintiff did not comply with the conditions of the statute, in failing to file, as was her statutory duty, the report and X-rays. The certification form did read so as to indicate that the person certified is free from tuberculosis but it would be a simple matter for the certifying physician to make the alterations necessary to indicate the reverse. As the plaintiff had ceased her work on her own volition and later returned to it without using the statutorily prescribed certification, the city had no notice other than that she was absent on sick leave, she received pay accordingly, and her failure to comply with General Laws, Chapter 71, Section 55B, relieved the city of its liability under the section.

The Court refused to decide if Section 55B was unconstitutional, as had been held in the Superior Court below. Since the plaintiff was not entitled to recover for failure to comply with the statute, the constitutional issues were properly avoided.

§20.9. Dismissal of superintendent. On May 16, 1961, Sullivan was elected Superintendent of Schools by the Revere School Committee. By contract, dated July 10, 1961, the Committee engaged Sullivan, as superintendent, for a term of three years from August 1, 1961. By vote, on November 13, 1962, the School Committee then in office terminated the contract and, by written notice prior to April 15, 1963, notified Sullivan that he was not to be employed for the following school year. Thereupon, Sullivan brought the present action, *Sullivan v. School*

Committee of Revere,¹ to determine the validity of the three-year contract of July, 1961.

The Superior Court decree declared that the contract was validly terminated by the November, 1962, vote of the Committee and by their written notice before April 15, 1963. Since, therefore, Sullivan was not serving at the discretion of the Committee under General Laws, Chapter 71, Section 41, i.e., was not on tenure, he was subject to dismissal without cause. On appeal, the Supreme Judicial Court affirmed this ruling.

In its opinion, the Court first noted that existing statutes specified that the school committee of a town not in a superintendency union or district shall employ a superintendent of schools and fix his compensation,² and the school committee "shall elect a superintendent of schools annually, except as provided in section forty-one of chapter seventy-one."³ The exception of Section 41 of General Laws, Chapter 71, provides, inter alia, that a superintendent not serving at discretion is to be notified in writing on or before April 15 if he is not to be employed for the following school year. Absent this notice, he is, in effect, appointed for the following school year.

The Court stated that these statutes clearly specified the term for which a superintendent not under tenure is engaged. The fact that one might argue that different powers in a school committee would insure better schools is not pertinent. Sullivan had argued that the statutory provision requiring the annual election of a superintendent who was not under tenure⁴ should be considered as only a minimal requirement and that under its grant of the general charge of the public schools,⁵ a school committee could be justified in employing a superintendent under a three-year contract. The Court held that the grant to the committee of the general charge of all the public schools did not lessen the significance of a legislative specification relating to the committee's employing power.

The Court also stressed that the legislature has determined that supremacy relating to the continued employment of a superintendent is, except as to tenure, in the committee in office. The committee is not to be controlled by the action of a past committee except to the limited extent the statutes prescribe.

§20.10. **School election irregularities.** Abbene, one of the twelve candidates contesting for six positions on the Revere School Committee, sued to compel the city Board of Election Commissioners to certify his election to the School Committee.¹ He alleged certain irregularities in the election held on November 5, 1963.

§20.9. ¹ 1964 Mass. Adv. Sh. 1317, 202 N.E.2d 612.

² G.L., c. 71, §59.

³ Id., c. 43, §92.

⁴ Ibid.

⁵ Id., c. 71, §37.

§20.10. ¹Abbene v. Board of Election Commissioners of Revere, 1964 Mass. Adv. Sh. 1411, 202 N.E.2d 827.

Testimony in the Superior Court established that, at the close of the election, the Board made a return that Abbene, with a total vote of 4657, had run seventh in the field of twelve and thus was not elected and that Moschella, another of the candidates, had received a total vote of 4685 and was thereby elected as the sixth member of the School Committee. After a recount, requested by Abbene, the tally was reported as 4671 to 4637 in favor of Moschella. During the recount, workers on behalf of Abbene challenged and protested 39 ballots and "questioned" 56 other ballots which were subsequently (during the recount) protested by Abbene. The 39 ballots originally protested were enclosed in an envelope by the Election Commissioners and sealed, and the other 56 protested ballots were placed in a separate envelope and sealed.

In its opinion, the Supreme Judicial Court first noted that while neither of the two envelopes containing the protested ballots contained the required certification by the Board of Election Commissioners that it contained all ballots that had been protested,² all of the protested ballots were actually in the envelopes. The Court noted also that the lower court had found fraud in the marking of 24 ballots from the first envelope, and in the marking of 33 ballots from the second envelope, and that pursuant to these findings, the corrected totals should read 4642 for Abbene against 4619 for Moschella. The Court held that their own examination of the questioned ballots revealed that there was a basis for the finding that they were fraudulently marked. Although there was a failure to comply strictly with the certification provision of the statute, the objective of the statute was satisfied by the substantial if not exact compliance.³

The Court rejected the argument that the use of the word "shall" in the statute imposed the requirement of strict compliance with the prescribed formalities; the facts of the present case constituted sufficient compliance with the statute. The Court then quoted Judge Learned Hand: "[It] is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."⁴ Thereupon, the Board of Election Commissioners was ordered to certify that Abbene was elected to the School Committee.

§20.11. Award of milk contract. The Holyoke School Committee, in advertising for written bids to supply milk during the 1964-1965 school year, reserved the right to reject any bids. Gosselin's Dairy, Inc., which had its principal office in Chicopee, submitted a bid estimated to cost the city \$65,650. However, the award was made to a Holyoke firm which had submitted a bid of \$67,210. A Superior Court ruling

² G.L., c. 54, §135, requiring that all protested ballots should be placed by election officials in a separate sealed envelope, who then shall certify that the envelope contains all protested ballots.

³ See note 2 *supra*.

⁴ Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945).

had dismissed Gosselin's request for a review of the School Committee's action. This ruling was appealed to the Supreme Judicial Court in *Gosselin's Dairy, Inc. v. School Committee of Holyoke*.¹

In its opinion, the Court commented that the sole question was whether the award had to be made to the lowest responsible and eligible bidder under General Laws, Chapter 30, Section 39M, requiring that "all contracts for construction and materials be awarded to the lowest and responsible bidder." The Court found that in context, Section 39M, in defining "material," had to be interpreted as referring only to materials used in the construction, alteration, or repair of any public work as the section is principally devoted to public works construction. The milk contract was, therefore, governed by General Laws, Chapter 40, Section 4B, which refers to contracts "for the purchase of equipment, supplies or materials" and does not require award to the lowest responsible bidder. Gosselin's arguments, that the public interest required a lowest responsible bidder provision for purchases of supplies such as milk, were properly addressed to the legislature, not the judiciary. Thereupon, the lower court judgment was affirmed.

§20.12. **School civil service position: Abolition.** On February 5, 1962, the Salem School Committee effected a reorganization of the system's school lunch program that excluded the position of senior account clerk then held by Mrs. Catherine Hughes. After a hearing and review, as was provided by statute,¹ and which had been requested by Mrs. Hughes, the Civil Service Commission on April 25, 1962, accepted the report of the hearing officer that the School Committee's action was not justified, and reversed the action.

The School Committee, in *School Committee of Salem v. Civil Service Commission*,² sought judicial review of the Commission determination. The denial by the Superior Court of this writ of certiorari was reversed by the Supreme Judicial Court, thus, in effect, affirming the action of the School Committee. The Supreme Judicial Court found:

The evidence before the hearing officer was insufficient to warrant his conclusion that the school committee's action was unjustified. . . . His finding is, in essence, based on his disagreement with the committee's judgment that a reorganization which included the abolition of the position [of senior account clerk] would promote efficiency and economy.

Such a decision, however, was for the school committee. [The statute]³ does not substitute the Civil Service Commission for the school committee in the operation of the school department.

The school lunch program is a school committee function. . . . The record shows that the committee exercised its best judgment.

§20.11. ¹ 1965 Mass. Adv. Sh. 473, 205 N.E.2d 221.

§20.12. ¹ G.L., c. 31, §43(b).

² 1965 Mass. Adv. Sh. 477, 205 N.E.2d 707.

³ G.L., c. 31, §43.

It shows that, after deliberation, the school committee effected a reorganization that excluded Mrs. Hughes' position. That reorganization justified the abolition of the position.⁴

The Court held that no basis for overriding the School Committee's decision appeared, therefore, and further held that the suit was properly not dismissed for mootness.

§20.13. Rejection of general bids: Invalidity of sub-bids. After the issuance of properly prepared invitations for general bids and sub-bids for a school addition, the Wayland School Building Committee received nine general bids. The two lowest were those submitted by Alexander Associates, Inc. (\$299,400), and by Cardarelli Construction Co. (\$299,230). Each general bidder used the bids of the same sub-bidders except for the electrical work. Alexander used the sub-bid of the Power Electrical Co. of \$22,000 and Cardarelli used that of Guertin Co. of \$22,490.

Subsequently, Cardarelli protested the Alexander bid as violative of existing statutory bidding laws and procedures,¹ on the grounds that while the Alexander bid included in it the sub-bid of Power Electrical Co., the Power sub-bid, as submitted, had specifically restricted its bid to the "Patten Construction Co., Inc. — Only."²

Thereupon, in *Wayland School Building Committee v. Cardarelli Construction Co.*,³ the Committee sought a judicial determination as to whether the Alexander bid violated the bidding laws and procedures and whether the general contract should be awarded to Alexander or Cardarelli. The Superior Court ruling, to the effect that the Alexander bid was not invalid, was affirmed by the Supreme Judicial Court. Its opinion referred to the lower court findings and rulings as comprising "a full and accurate treatment of the issues." Included in those findings and rulings were the following significant comments:

1. "[There] may be situations where a sub-bidder may not want for adequate reasons to contract with any of the general contractors but one. There appears to be no law to prevent him from submitting a bid limited to one general contractor. It is his offer and he may contract with whomsoever he pleases."

2. "[The pertinent] statute is framed to have the general contractor with whom a sub-bidder does not wish to do business *excluded by name*. The legislative intent is plain . . . from the [statute]."⁴ [Emphasis added.]

3. "The legislature has set up in the statute the test to determine whether the awarding authority has the power to invalidate or reject a general bid based on claimed defective sub-bids."

4. "[The] legislature has emphasized its intent that general contrac-

⁴ 1965 Mass. Adv. Sh. 477, 478-479, 205 N.E.2d 707, 709-710.

§20.13. ¹ G.L., c. 149, §§44A-44L.

² Patten was one of the other seven general bidders.

³ 1965 Mass. Adv. Sh. 962, 208 N.E.2d 228.

⁴ G.L., c. 149, §44H.

tors to be precluded from using a sub-bid . . . must be named as general bidders expressly excluded. If a general bidder is excluded by words of indirection and not explicitly by name . . . his general bid shall not be held invalid or rejected. . . ."⁵

5. "[The] construction of the disputed clause in the Power bid is not an express exclusion by name of Alexander . . . as a general bidder."

6. "Furthermore, the determination of the invalidity of a sub-bid will not invalidate the general bid. . . . [The] Wayland School Building Committee can not reject the general bid of . . . Alexander . . . because of an invalidity of the Power sub-bid. . . ."

The opinion concluded with the comment that the Court could not grant the petition of the School Building Committee for a judgment "whether the contract should be awarded to Alexander or Cardarelli, as was sought by the committee in this suit, as the competence of bidders is to be determined under the statute by the awarding authority and not by the Court."

§20.14. 1961 school committee vote: Effect on 1962 committee. In early December, 1961, and prior to the submission of the estimated 1962 school budget, the Springfield School Committee voted to increase the salaries of teachers and various other school employees. On December 26, 1961, the Committee presented an estimated budget which, in effect, totaled \$11,846,099. On January 1, 1962, a new School Committee was elected. Seven members of the 1961 Committee were no longer members of the new Committee. Later, in January, the 1962 School Committee voted to reduce (or rescind) the salary increases which had been voted by the 1961 Committee in an amount totaling \$223,890. This reduced figure was the amount put into the 1962 city budget in April, 1962.

Thereupon, in *Hilliker v. City of Springfield*¹ a ten-taxable-inhabitants' suit was brought in the Superior Court² against the city, alleging that the amounts necessary for the support of the city's schools for the year 1962 were not included in the city's annual budget. The lower court in effect held that: (1) the members of the 1962 School Committee were not bound by the action of the 1961 Committee, and hence could make changes in the estimates submitted by the 1961 Committee; and (2) the salary schedules voted in December by the 1961 Committee to take effect nine months later did not constitute a contract with the teachers which could not be "impaired" by the 1962 Committee vote to reduce (or rescind) the salary increases.

In affirming the lower court judgment, the Supreme Judicial Court noted first that it was the contention of Hilliker that: (1) the estimate of expenditures presented by the 1961 Committee was "the only required estimate"; and (2) therefore, under existing law³ the city was

⁵ The clause in the Power sub-bid had specifically restricted its bid to the "Patten Construction Co., Inc. — Only" but had not mentioned Alexander by name.

§20.14. 1 1965 Mass. Adv. Sh. 951, 207 N.E.2d 895.

² Under G.L., c. 71, §34.

³ *Ibid.*

required to appropriate funds for the salary increases appearing in this estimate.

Then the Court made the following noteworthy comments:

That the power to determine teachers' salaries is vested solely and absolutely in the school committee is not to be doubted. . . . In making this determination, the school committee was not required to submit a budget, including estimated salaries, in 1961. The time limits provided in G.L., c. 44, §31A [between November 1 and December 1] do not apply to school committees. . . . The estimated budget need only be seasonably submitted with reference to the date on which the budget is presented to the city council. . . .

We, therefore, are of opinion that the 1962 committee had authority to establish new salary schedules, thereby reducing the amount which the city was obligated to appropriate. . . .⁴

The Court also rejected the argument that the 1962 School Committee abused its authority in making salary deductions in the interest of the financial well-being of the city of Springfield. Even if it were assumed that this was the Committee's purpose, the evidence did not establish that the Committee failed to consider the welfare of the schools.

§20.15. Racial census in public schools. On March 2, 1964, the State Commissioner of Education, in a letter to all chairmen of school committees and superintendents of schools in Massachusetts, referred to current problems concerning the racial composition of the student bodies in the public schools of the Commonwealth. He also enclosed school census forms to be returned before April 1, 1964, together with instructions. The forms asked for the total number of "white" and "non-white" students in each school.

On March 16, the New Bedford School Committee's secretary (the Superintendent of Schools) notified the Commissioner by letter that the Committee had voted to take no action on the March 2 letter. The Commissioner repeated his request for compliance on March 23 and on May 1. On May 11, a letter from the New Bedford Superintendent of Schools informed the Commissioner that the Committee had voted that he be told that, if he wanted a census, he or his delegate "should come to New Bedford and conduct the census."

On June 12, 1964, in *New Bedford School Committee v. Commissioner of Education*¹ the Committee and others brought a bill against the Commissioner and the State Board of Education for a declaration that: (1) the School Committee was not required to conduct the racial census; and (2) the state authorities could not, as a result of the failure to take such census, withhold any school aid to which New Bedford was entitled.²

⁴ 1965 Mass. Adv. Sh. 951, 954, 207 N.E.2d 895, 897-898.

§20.15. ¹ 1965 Mass. Adv. Sh. 1029, 208 N.E.2d 814.

² G.L., c. 70.

The Superior Court decree, which sustained the objections of the state authorities to the suit, was appealed to the Supreme Judicial Court on the grounds, primarily, that: (1) the state authorities had not furnished any criterion by which to conduct a racial census; (2) the racial composition of the New Bedford schools "does not lend itself to the drawing of a . . . realistic distinction between 'white' and 'non-white' students"; and (3) the proposed racial census "could serve no useful educational purpose."

The Supreme Judicial Court reversed the lower court decree and returned the case to that court for a further hearing on its merits. In so doing the Court made the following statements because they would, being brief statements of the applicable law, facilitate ready determination of the dispute.

[W]e think that, in the aggregate, the statutory provisions³ authorize the commissioner, acting reasonably, to compel the production of information of the general character now sought. . . .

The statutes (especially c. 72, §3) sufficiently express a legislative intention that the commissioner shall have power to compel the production of reasonable information by the cities and towns relevant to education in the cities and towns and to pending educational problems of the department. . . .

The census form [here involved] however, contained no space for a jurat. No requirement of an oath was indicated. . . . Consequently, we assume that the commissioner was not asking for inclusion of the census material in the annual return. . . .⁴

We have no doubt (a) that the commissioner has power to require relevant, unsworn information, reasonably required by him, to be filed by local school authorities separately from the annual return, or (b) that the production of such separate information may be enforced by mandamus. . . . We would not regard such separate, unsworn information, however, as part of the annual return, at least in the absence of a clear direction by the commissioner that it be included in the return. . . .

The provisions for withholding State aid . . . because of a city's failure to file "the returns and the report required by law" . . . appear to refer to the annual report of the school committee (. . . required to be filed with the commissioner each year by April 30) and to the formal returns (and additional material) called for by [law]. . . .⁵ If, at the hearing on the merits, the racial census is found not to have been required as a part of the formal annual returns . . . the [withholding of State aid] cannot be applied to the city for failure to file the census reports. . . .

[The terms "white" and "non-white"] seem to us reasonably susceptible of application by school superintendents and teachers

³ G.L., c. 69, §1; id., c. 70, §§3, 4, 9; id., c. 72, §§2, 3.

⁴ Id., c. 72, §3.

⁵ Id. §§3-6.

for the present general purposes. We need not now consider any difficulties inherent in applying these terms as to individuals, covered by such a census, for other purposes.

The classification is one which the courts and the bureau of the census have found it practical to apply in New Bedford and elsewhere. . . . Reasonable accuracy should be possible for a school committee, school officers, and teachers who are not reluctant to cooperate with the commissioner by furnishing him with information to which he is entitled by statute. The correspondence [in this case] strongly suggests such reluctance on the part of the school committee. . . .

The relevance of the information sought cannot reasonably be questioned. We take judicial notice of the fact that controversial racial problems currently affect the administration of public schools, even in Massachusetts, and that information about the racial composition of student bodies may be of value to the [education] department's work. . . . The solution of these problems doubtless will be assisted by the dispassionate consideration of all relevant facts, some of which can be obtained only from local school authorities.⁶

§20.16. Racial segregation in public schools. In *Barksdale v. Springfield School Committee*,¹ parents of Negro children residing in Springfield brought suit for a judicial declaration that the Committee and its Superintendent of Schools, by assigning the children to racially segregated schools in that city, were illegally denying such children their rights under the Federal Constitution. The thirty-eight elementary and eight junior high schools in the Springfield system were organized on the "neighborhood plan" under which children were required to attend the school within the district in which they lived.² Some of the elementary and junior high schools had a heavy concentration of Negro children. Approximately 82 per cent of the system's Negro elementary-grade children were enrolled in eight of the thirty-eight elementary schools; in these eight schools, the percentage of Negro enrollment was 20, 46, 48, 55, 59, 75, 85, and 90 respectively. Approximately 86 per cent of the Negro junior high school children were in two of the eight junior high schools; in these two schools, the Negro enrollment percentages were 15 and 63.

In its opinion, the district court noted first that the plaintiffs were contending (1) that the racial imbalance in some of the Springfield schools was segregation in the constitutional sense and within the 1954 decision of the Supreme Court in *Brown v. Board of Education of Topeka*;³ (2) that continued adherence to the "neighborhood policy," by the Springfield school authorities, was tantamount to a law compel-

⁶ 1965 Mass. Adv. Sh. 1029, 1032-1035, 208 N.E.2d 814, 817-819.

¹ 237 F. Supp. 543 (D. Mass. 1965), also noted in §11.7 *supra*.

² The city's four senior high schools were not involved in this suit.

³ 347 U.S. 483, 74 Sup. Ct. 686, 98 L. Ed. 873 (1954).

ling segregation; and (3) that the school authorities had deliberately drawn district lines and assigned pupils so as to segregate them by race.

The court also noted (1) that the School Committee, after recognizing in September, 1963, "that integrated education is desirable," had resolved to take action to eliminate racial concentration in the schools to the fullest extent possible and to have plans prepared by March, 1964, to solve the problem, but had discontinued the planning awaiting the outcome of the present litigation; (2) that neighborhood school district lines had been drawn in conformity with accepted criteria (school location and capacity; the safety and convenience of the children) and not in order to segregate children by race; (3) that those schools in which the vast majority of Negro students were enrolled consistently ranked lowest in achievement ratings; and (4) that special school programs for gifted children had few, and sometimes no, Negro participants.

The issue in this case, the court said, was not whether there is a constitutional mandate to remedy racial imbalance — the Springfield school authorities argued there was not — but whether there is a constitutional duty to provide equal educational opportunities for all children within the system. The court observed that "racially imbalanced schools are not conducive to learning, that is, to retention, performance, and the development of creativity. Racial concentration in his school communicates to the negro child that he is different and is expected to be different from white children."⁴

The court also decided that, while there was no deliberate intent of the school authorities to segregate the races, segregation in the sense of racial imbalance existed largely because of a rigid adherence to the neighborhood plan. The court considered it unnecessary to define the term racial imbalance, but found, in the light of the ratio of white to nonwhite in the total population in the city of Springfield, a nonwhite enrollment of appreciably more than 50 per cent in any one school is tantamount to segregation.⁵ The court continued:

Therefore, even if all schools are equal in physical plant, facilities, and ability and number of teachers, and even if academic achievement were at the same level at all schools, the opportunity of negro children in racially concentrated schools to obtain equal educational opportunities is impaired. . . .

It is neither just nor sensible to proscribe segregation having its basis in affirmative state action [as in *Brown*] while at the same time failing to provide a remedy for segregation which grows out of discrimination in housing, or other economic or social factors. Education is tax supported and compulsory, and public school educators, therefore, must deal with inadequacies within the educa-

⁴ 237 F. Supp. 543, 546 (D. Mass. 1965).

⁵ The total elementary school enrollment for 1963-1964 was 80.3 per cent Negro and 2.3 per cent Puerto Rican. Puerto Ricans were not involved in the suit and were disregarded because of their small numbers.

tional system as they arise, and it matters not that the inadequacies are not of their making. This is not to imply that the neighborhood school policy per se is unconstitutional, but that it must be abandoned or modified when it results in segregation in fact. . . . In view of the disparity of population and school attendance, there cannot be equal representation of white and negro students in each school, but there must be no segregated schools.⁶

Therewith, the Springfield school authorities were ordered to present a plan to the court by April 30, 1965, to eliminate to the fullest extent possible racial concentration in the Springfield schools within the framework of effective educational procedures, as guaranteed by the equal protection clause of the Fourteenth Amendment.⁷

The decision of the district court was reversed on appeal, and the vacated order was remanded with directions to dismiss without prejudice to the plaintiffs' right to institute a new action in the event of changed circumstances. The First Circuit opinion, by Chief Judge Aldrich, stated:

[A]s we read it, through all of its opinion prior to the order the [district] court appears to hold that the plaintiffs have a constitutional right to the abolition of racial imbalance to preserve their equal educational rights, but its order is restricted to reduction only so far as feasible within the framework of effective educational procedures.

The difference between the court's order . . . and the seeming absolutism of its opinion unilluminated by its order, is substantial. "Effective educational procedures" involve many factors, and must concern all students. . . . [T]he very correction of racial imbalance may have adverse effects upon the educational environment.

Certain statements in the [district court] opinion, notably that "there must be no segregated schools," suggest an absolute right in the plaintiffs to have what the court found to be "tantamount to segregation" removed at all costs. We can accept no such constitutional right. . . . [W]hen the goal is to equalize educational opportunity for all students, it would be no better to consider the Negro's special interests exclusively than it would be to disregard them completely. . . .

[R]acial imbalance disadvantages Negro students and impairs their educational opportunities as compared with other races to such a degree that they have a right to insist that the [school authorities] consider their special problems along with all other relevant factors when making administrative decisions. . . . Thus when suit was instituted, in January 1964, the school authorities

⁶ 237 F. Supp. 543, 546-547 (D. Mass. 1965).

⁷ This is similar terminology to that used in the 1963 Springfield School Committee resolution, which recognized that "integrated education is desirable" and resolved to eliminate "racial concentration" in its schools.

had already recognized . . . what the [district] court's order later commanded.⁸

The district court had noted that, in September, 1963, the Springfield School Committee had resolved to take action necessary to eliminate racial concentration in the schools within the framework of effective educational procedures. It had, accordingly, voted to develop proposals designed to solve the problem, which were being held in abeyance during the pendency of the law suit. The Court of Appeals held that the plaintiffs needed no remedy since the School Committee and authorities could complete their plan and it may meet federal constitutional standards. No court order was therefore now required. But if the school authorities "permanently disregard their previously announced purpose to reduce imbalance so far as educationally feasible, a new action may be brought to determine whether the plaintiffs are, in that event, entitled to relief."⁹

The court further considered whether the School Committee vote of September, 1963, to eliminate racial concentration in the schools was itself unconstitutional since it involved classification by race. The court stated:

The . . . proposed action does not concern race except insofar as race correlates with proven deprivation of educational opportunity. . . . It would seem no more unconstitutional to take into account plaintiffs' special characteristics and circumstances that have been found to be occasioned by their color than it would be to give special attention to physiological, psychological or sociological variances from the norm occasioned by other factors. That these differences happen to be associated with a particular race is no reason for ignoring them.¹⁰

C. OPINIONS OF THE ATTORNEY GENERAL

§20.17. General. The following opinions issued by the Attorney General between September 1, 1964, and August 31, 1965, are of importance to education generally, in terms of the chapters of the General Laws noted.

§20.18. "Open-meeting" law and state boards. Under General Laws, Chapter 30A, Section 11A, may the trustees of the University of Massachusetts select the site of a new medical school by way of a secret ballot? (Question raised by the Governor.)

Under the Attorney General's opinion, dated July 19, 1965, they may. The opinion also held: (1) "The 'open-meeting law' requires that the meeting itself must . . . be conducted in public . . . except when certain specified situations occur, at which times the [trustees] may vote to proceed in executive session." (2) "But nothing appears in the law

⁸ *Springfield School Committee v. Barksdale*, 348 F.2d 261, 263-264 (1st Cir. 1965).

⁹ *Id.* at 266.

¹⁰ *Ibid.*

which would obligate each individual trustee to reveal how he voted, or which would require the . . . records to contain the same, and the [trustees] could lawfully exercise discretion to withhold such information." (3) Contrariwise, the "open-meeting law" applicable to municipalities, General Laws, Chapter 39, Section 23A, does contain an express prohibition against the use of secret ballots.¹

§20.19. Civil service. Under General Laws, Chapter 31, is the new position of "Education Information Officer," authorized for the Department of Education for the fiscal year 1965, subject to the civil service law and rules? (Question raised by the Commissioner of Education.)

By opinion dated January 21, 1965, the Attorney General stated that, since the position and duties of the Education Information Officer are clearly related to "the promulgation of information dealing with better teaching methods as well as information pertaining to the present school or college level," the new position is not subject to civil service law and rules.

§20.20. Support of public schools. Under General Laws, Chapter 40, Section 5(34), must expenditures for out-of-state travel by school committee members be provided by cities and towns whether or not the expenditures were authorized by the board of selectmen or other town or municipal executive heads? (Question raised by the Commissioner of Education.)

Such expenditures must be provided, according to the Attorney General's opinion dated July 8, 1965. "The fiscal independence of school committees is well established. To derogate from this fiscal independence, a clear indication of legislative intent is necessary. Absent such indication, G.L., c. 71, §34, continues to give to school committees power to require the appropriation of funds covering those expenditures for out-of-state travel that are 'reasonably deemed by the committee to bear a relation to its statutory mandate' [to exercise general charge of the schools]."¹

§20.21. Indemnification of teachers. Under General Laws, Chapter 41, Section 100C, can insurance be taken out by a school committee for its employees or is it limited to a cash settlement of a claim or judgment? (This and subsequent questions in this section raised by the Commissioner of Education.) The Attorney General held, in his opinion dated February 25, 1965, answering the Commissioner's various questions, that school committees may, if they wish, take out insurance to indemnify their employees.

What action can be taken against a school committee which, after finding that the act which resulted in a judgment against one of its teachers was committed while the latter was acting as a teacher, fails to place in its budget the amount necessary to pay for the expenses or

§20.18. ¹ See also G.L., c. 39, §23A, concerning the "open-meeting" law and municipalities.

§20.20. ¹ The opinion is also of relevance to G.L., c. 71, §34, relating to support of public schools.

damages sustained by the teacher? The Attorney General stated that, irrespective of whether the school committee has appropriated funds in anticipation of the judgment, such a judgment, like any other judgment against a town, may be filed with the board of selectmen and thereafter the assessors must see to the appropriation of funds to satisfy it.

Will an action by ten taxable inhabitants lie, under General Laws, Chapter 71, Section 34, to compel the town to place the amount of the claim in the budget? In the Attorney General's opinion, yes. The petition of ten taxable inhabitants may be applied to place the claim in the budget. Funds for indemnification of teachers fall within the language of General Laws, Chapter 71, Section 34, providing for the support of public schools and "are to be dealt with in the same manner as funds for general school purposes."

Is a school committee prohibited from putting funds in its budget to pay the legal costs of a libel suit which involves one of its teachers? The Attorney General stated: "A libel suit falls within the provision for 'any other acts done' by a teacher which is included in G.L., c. 41, §100C." Hence, a libel suit judgment could be paid out of funds appropriated by the school committee in pursuance of Section 100C, subject to the further provision that the act which resulted in the judgment was accomplished in the scope of the teacher's employment.¹

§20.22. School aid. Under General Laws, Chapter 70, Section 1, are the minors who reside on the federal installation at Westover Air Force Base, Chicopee, to be included within the geographical limits of Chicopee for purposes of state aid to public schools? (Question raised by the Commissioner of Education.)

Yes, stated the Attorney General in an opinion dated July 8, 1965, since the expressed purposes of General Laws, Chapter 70, Section 1, are to promote the equalization of (1) "educational opportunity in public schools of the Commonwealth"; and (2) "the burden of the costs of schools to the respective towns."

The opinion also held: (1) The first purpose of Section 1 "will be fulfilled by the fact that reimbursement to Chicopee for the costs of the education of the [Westover] pupils will increase the total amounts available for education in Chicopee and thus improve the educational opportunities available to all Chicopee public school pupils"; and (2) "Failure to consider the school pupils who reside on the military reservation increases the burden on local taxpayers and is contrary to the [second purpose of Section 1] that the local burdens be equalized by state reimbursement of part of the per pupil cost of instruction."

§20.23. State aid for public schools. Under General Laws, Chapter 70, Section 3, may the Treasurer and Receiver General withhold money which would otherwise be payable to the city of New Bedford under General Laws, Chapter 70, Section 3, as a result of the certifica-

§20.21. ¹The opinion is of pertinence also to G.L., c. 71, §34, relating to support of public schools.

tion by the Commissioner of Education that returns of that city have not been filed with his office in accordance with General Laws, Chapter 72, Section 6? (Question raised by Treasurer and Receiver General.)

Under the Attorney General's opinion of April 29, 1965, the Treasurer is not authorized to distribute funds, pursuant to General Laws, Chapter 70, Section 3, "unless and until the Commissioner [advises] or a court of competent jurisdiction rules that the reports required under Chapter 72 have been filed with the Commissioner's office in accordance with applicable provisions of the General Laws. To date, no such information has been given or ruling issued."

In a further question, is the effect of the June 23, 1965, Supreme Judicial Court decision in *School Committee of New Bedford v. Commissioner of Education*¹ such as to permit the State Treasurer to release some \$600,000 in school aid funds which he had withheld from the city of New Bedford, on the strength of the April 29, 1965, opinion of the Attorney General (above), which opinion had been rendered following the refusal of New Bedford to comply with a directive of the Department of Education that the city conduct a racial census in its school and report its findings to the Commissioner? (Question raised by the Treasurer and Receiver General.)

The Attorney General held, in opinion of July 9, 1965:

There is at this time no judicial order on record which would compel either retention or immediate release of the [funds] in question. Should the Commissioner [of Education] determine that the racial census report is a part of the annual return [General Laws, Chapter 72, Section 3], and that such a report has not been filed, he may order that [the funds] still be withheld. If, on the other hand, the Commissioner concludes that the racial census report is not a part of the annual return — or if such a conclusion is arrived at after a hearing upon the merits . . . — then the funds must be released and paid over to the City of New Bedford.

The opinion also held: (1) "The legal situation with respect to the funds currently held in the Treasury is — for all practical purposes — the same as it was prior to the commencement of litigation"; (2) The Court ruling "is based upon a procedural consideration only, although the Court does include extensive additional comments or 'dicta' addressed to the legality of the taking of a racial census as well as to the legality of the withholding of school aid amounts"; and (3) Among such "dicta" were Court conclusions that the Commissioner could lawfully require the taking of a racial census and that such information could be required as a part of, rather than separately from, the annual return required by General Laws, Chapter 72, Section 3.

In view of the opinion of the Attorney General dated July 8, 1965,²

§20.23. 1 1965 Mass. Adv. Sh. 1029, 208 N.E.2d 814, noted in §20.15 *supra*.

² See §20.22 *supra*.

should the city of Chicopee be granted additional state aid for past years? (Question raised by the Commissioner of Education.)³

In an opinion dated August 4, 1965, the Attorney General held that, since the procedure as outlined in General Laws, Chapter 70, Section 9, allows the Commissioner to certify the amount due to each community "up to December 31, Chicopee should receive reimbursement for this past school year of 1964-1965. However, since Chapter 70 [Section 3] is quite explicit in the procedure for the granting of this financial aid . . . Chicopee should not be awarded a further lump sum payment for any earlier school year."⁴

The opinion also held: (1) "It is evident from [General Laws, Chapter 70, Sections 3, 9; Chapter 72, Section 3] that the grant for each year is to be considered as a separate transaction. . . . There is no provision . . . that would authorize a disbursement . . . which covered more than the single 'preceding school year.'"

§20.24. Reimbursement for pupil transportation. Under General Laws, Chapter 71, Section 7A, must the town of Berkley, which has no high school and sends its high school students to a regional high school in the adjoining town of Dighton, and to which Berkley provides the transportation, provide transportation for high school students attending approved parochial schools in the adjoining city of Taunton? (Question raised by Commissioner of Education.)

In an opinion dated August 10, 1965, the Attorney General answered yes. "A school committee must provide transportation to an out-of-town private school for pupils in the same grades as pupils whom the school committee transports to an out-of-town public school."

The opinion also held: (1) "[A] school committee is obligated to provide transportation for private school pupils to the same extent as for public school pupils even though the cost per capita may be greater for the private school pupils"; and (2) "[A]s a result of [General Laws, Chapter 71, Section 7A, which requires competitive bidding on pupil transportation contracts], a school committee could lose its right to state reimbursement if it seeks to discharge its obligation by paying a transportation allowance to the parents of school children instead of providing the actual transportation."

§20.25. Massachusetts Executive Committee for Educational Television. Under General Laws, Chapter 71, Sections 13F-13I, (1) is the Executive Committee for Educational Television independently authorized to determine the rate structure for member systems, an operating budget sufficient to permit effective operation, and the number, qualifications, and reimbursement of its employees? (This and subsequent questions in this section raised by the Commissioner of Education.)

In his opinion of June 23, 1965, the Attorney General answered no. Determinations by the Committee in matters pertaining to educational

³ See also G.L., c. 70, §1, relating to foundation program for school aid purposes.

⁴ The opinion interrelates Sections 3 and 9 of G.L., c. 70.

television are subject to the approval of the Department of Education.

(2) Must secretarial or clerical employees of the Executive Committee be members of the civil service? Yes.

(3) May the Committee carry on its own business transactions or must they be processed through other divisions of the state government?

To the extent that the Committee expends monies received from school committees, organizations, or individuals and which are paid into the special Educational Television Program Fund, the Committee need not process its business transactions through other divisions of the state government, since it will not require a warrant and certification by the Comptroller, nor a vote by the Executive Council on the warrant. However, such warrant, certification, and Executive Council vote will be necessary for Committee expenditures from funds appropriated to it by the General Court.

(4) Is the Committee free to pay personnel without regard to the civil service salary schedules contained in General Laws, Chapter 30, Sections 46, 46B? For any employee who falls within civil service classifications, the Committee may not set a salary without reference to these sections of the statute.

§20.26. Regional school districts. Under General Laws, Chapter 71, Sections 14-16I, (1) may a regional school district be organized for administrative purposes only — that is, with no construction contemplated at the time of its organization? (This and subsequent questions in this section raised by the Commissioner of Education.)

By opinion dated July 20, 1965, the Attorney General stated that a regional school district cannot be organized for administrative purposes only.

The opinion also held: (a) "Instituting an administrative reorganization does not establish a regional school district. In order to create such a district the communities must comply in every respect with the provisions of G.L. c. 71, §§14-16I. . . ."

(b) "The fact . . . that no construction is contemplated is a strong, if not overriding consideration, indicating a failure to take those steps requisite to establishing a regional school system."

(c) "As a practical matter . . . it is hard to envision a situation in which the establishment of a regional school district would not require a well-planned construction program."

(2) May a regional school district assess at a flat rate (i.e., \$1.00) a member town for its share of construction costs for an elementary school to be constructed in another town within the regional district?

Yes, but "only where such flat rate assessment is made in accordance with the agreement [General Laws, Chapter 71, Section 16] between the towns comprising the school district. It is for the towns to work out between themselves the amount each will contribute to construction costs. The fact [that] the amount agreed upon is expressed in terms of dollar amounts instead of a mathematical ratio or proportion would not invalidate that part of the agreement."

§20.27. Placement of emotionally disturbed children. Under Gen-

eral Laws, Chapter 71, Section 46I, is a parent entitled to be reimbursed for expenses incurred in caring for his twin sons at a private school for emotionally disturbed children, for the 1963-1964 school year, when the commitment of the children to the school has not received the prior approval of the Department of Education or the Governor? (Question raised by the Commissioner of Education.)

In his opinion of October 29, 1964, the Attorney General held that the Department may not approve the parent's request for reimbursement incurred in the 1963-1964 period. The statute contemplates that the act of "sending" an emotionally disturbed child to a school, or like institution, is to be the act of the Department of Education and not of the parents.