Note from the Attorney General's Office:

1933 Op. Att'y Gen. No. 33-1832 was modified by
1958 Op. Att'y Gen. No. 58-2991.

I call your attention to a former opinion of this office, Opinions of the Attorney General for 1931, Vol I, page 319, which held as disclosed by the fifth and sixth branches of the syllabus:

"* * * * * *

5. A public library established by authority of Section 7635, General Code, must furnish *free* library service to all the inhabitants of the school district in which it functions, including school pupils, teachers, and school authorities and all of said inhabitants are equally entitled to said service.

6. A board of trustees of a school district library established by authority of Section 7635, General Code, is a distinct, independent unit of government created for the purpose of providing *free* library service to all the inhabitants of the school district in which it functions." (Italics the writer's.)

The word free is defined in Webster's New International Dictionary as follows:

"Given or furnished without cost or payment; free of charge, or the like; gratuitous * * *."

I am informed that the proposed plan of such libraries is that there is to be a free copy of a particular book, but a per diem rental charge on additional copies, such charge to be made until the cost of the additional copies are paid and then such books are to be put on the free list. However, I am unable to conceive of this as "free" library service under any definition of the word "free."

Since I am unable to find any express or implied authority for such per diem charges on additional copies of books, even though such additional copies are to be later circulated without charge, and since such libraries are intended to be for the free use of the public, I am of the opinion that such rental charges for additional copies are unauthorized, and inconsistent with Section 7635, General Code, providing that such libraries must be "free to all the inhabitants thereof."

Specifically answering your inquiry, it is my opinion that a school district library cannot, by virtue of Section 7635, General Code, establish a rental collection for books and charge a fee to the persons to whom such books are issued.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1832.

SCHOOL—BOARD OF EDUCATION—UNAUTHORIZED TO LEASE ROOMS FOR SCHOOL PURPOSES ON CONDITION THAT CERTAIN TEACHERS BE EMPLOYED TO TEACH THEREIN—EMPLOYMENT OF TEACHERS AND ASSIGNMENT OF PUPILS IN CITY SCHOOL DISTRICT—SECTARIAN INFLUENCE IN PUBLIC SCHOOLS DISCUSSED.

SYLLABUS:

1. *It is not within the powers of a city board of education, when leasing rooms for public school purposes, to agree as a condition of said lease, that certain*

teachers will be employed to teach the schools to be conducted in the said rooms nor that certain pupils will be assigned to the said schools.

2. *In city school districts only such new teachers may be employed by a board of education as are appointed by the superintendent of schools. The power of the board of education in such cases extends only to the confirmation and approval of teachers appointed by the superintendent.*

3. *The duty to assign pupils attending public schools is reposed by statute in the superintendent of schools and a board of education is without power to override by contract, the authority so granted by statute.*

4. *The leasing by a board of education of rooms or buildings for public school purposes from a church or sectarian institution, and the payment of rent therefor, does not constitute the granting of aid to such sectarian institution or the diversion of school funds for sectarian purposes within constitutional prohibitions upon the use of public school funds for sectarian purposes.*

5. *A board of education may in its discretion, lawfully employ persons of any religious faith or of no faith to teach in the public schools, providing they are properly certificated.*

6. *Public schools must be so conducted that the pupils attending the said schools are not subjected to sectarian influence. The expenditure of public funds for the maintenance of schools not so conducted is unlawful.*

COLUMBUS, OHIO, November 6, 1933.

HON. B. O. SKINNER, *Director of Education, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion which reads as follows:

> "We are asking for a ruling on the legality of the following proposition made by the Bishop of Toledo, Karl J. Alter, to the City Board of Education of the City of Tiffin:
>
> 'We have reached not only the end of our resources but the end of our borrowing power. In consequence, some solution must be provided if our schools are to continue in operation. I recognize that it would be advantageous to the entire tax-paying public of Tiffin if some arrangement could be arrived at which enabled us to continue the operation of our schools with some assistance from the local board of education in accordance with the present legal requirements.'
>
> 'The legality of our proposition does not seem to be open to question in view of the fact that there are many schools in the State of Ohio actually operating in accordance with the plan which we offered. We may cite as instances in our immediate vicinity the schools at New Riegel, Alvada, Berwick, Fort Jennings, Marblehead, Raab, Richfield Center, Ottoville, Glandorf and others. The same conditions obtain in these places as we proposed to fulfill here. The legality of our operation and their arrangements are vouched for by the fact that the State of Ohio has offered no protest and no one has been able to cite any law which is thereby contravened.'
>
> The Bishop then offers the following propositions:
>
> '1. The Bishop of Toledo and the pastors of the respective parishes will rent to the Board of Education of Tiffin our present parish school buildings for the nominal sum of $1.00 per year.

2. We shall continue to maintain these school buildings provided that the Board of Education will pay the cost of light, heat and janitor service and, furthermore, will pay to the teachers the minimum salary provided by State Law for six teachers at St. Mary's School and for ten teachers at St. Joseph's School.

3. We shall agree to furnish at St. Mary's School in return for the above consideration two additional teachers without cost, bringing the total staff to eight qualified teachers. We shall furthermore, at St. Joseph's School, provide four additional qualified teachers, bringing the total number of the staff to fourteen teachers.

4. We recognize that in order to make this arrangement legal, it would be necessary for the Board of Education to assume jurisdiction of respective parochial schools during the time that this agreement would be in effect and this we are willing to grant, provided that our teaching staff shall consist of the Ursuline Sisters as at present engaged, and provided that the enrollment of the children as at present constituted will not be disturbed; that is to say, that all the children of St. Mary's Parish may attend St. Mary's School and that all children of St. Joseph's Parish may attend St. Joseph's School.' "

The proposal of Bishop Alter, referred to in your inquiry, contemplates the taking over by the board of education of the city school district of Tiffin, Ohio, of certain schools at present conducted as parochial schools and their operation thereafter as a part of the public school system of the Tiffin City School district.

It is well understood that public schools maintained at public expense must necessarily be under the jurisdiction of public boards of education, as appears by the fourth paragraph of the bishop's proposal. It is no doubt understood as well, that schools so conducted must under the laws of this state, be entirely free from sectarian influence.

It is proposed to lease to the Board of Education of the Tiffin City school district certain buildings in which parochial schools are now being conducted, apparently upon condition that certain teachers will be employed by the board in its conduct of public schools in the said buildings and that certain pupils will be permitted to attend these several schools.

A board of education is authorized by Section 7620, General Code, to "rent suitable schoolrooms ** for the schools under its control." No limitation is fixed by statute or otherwise as to from whom such rooms may be rented, nor as to conditions of rental or reservations that may be made by the lessor of such rooms in the rental contract. So long as the conditions of rental are such as not to be beyond contractual powers of a board of education there cannot be said to be any legal objection to its entering into the contract.

It is a well settled principle of law that boards of education, like other administrative boards, have such powers only as are expressly given to them by statute, together with such other powers as are necessary to carry out the powers expressly granted. Courts have at all times jealously guarded this principle and in many cases have drastically applied it. (See *Schwing* vs. *McClure,* 120 O. S., 335 and cases there cited.)

Should a board of education lease school rooms upon conditions or with reservations in the nature of grants to the lessor that were beyond the powers

of the board to make, the lease itself, would not for that reason be vitiated but the conditions or grants would be unenforcible.

Boards of education in city school districts are directed by Section 7702 of the General Code, to employ a superintendent. The superintendent is empowered by statute to appoint all teachers. His appointments are subject to confirmation and approval by the board of education. The board does not have power to employ a new teacher except one who has been appointed by the superintendent. The board may re-employ any teacher by a three-fourths vote when the superintendent refuses to appoint, but has no power in the employment of a new teacher except such as is given to it by statute, that is, to approve and confirm appointments made by the superintendent. (See Section 7703, General Code.)

Furthermore, boards of education are empowered by Section 7701 of the General Code, to dismiss teachers for inefficiency, neglect of duty, immorality or improper conduct and in a proper case it is their duty to do so. This power being given to them by statute, it is not within their power to surrender it or foreclose it by contract. Should a city board of education, in leasing school rooms, agree to employ certain teachers to teach the schools to be conducted in those rooms as a condition of such lease, the agreement would be entirely ultra vires and would not be binding in a legal sense on anyone.

The same may be said of an agreement by a board of education that certain pupils will be permitted to attend certain schools. The assignment of pupils is reposed by statute in the superintendent of schools in both city school districts and districts of a county school district and a board of education is wholly without power to take away the power so granted. (See Section 7764, General Code.) This statute is of later enactment than Section 7684, General Code, and, in my opinion, supersedes the authority granted in the earlier statute, to boards of education to assign pupils.

The reference in Bishop Alter's proposal to the board of education of the Tiffin city school district to the continuance of the present teaching staff and pupil attendance in case the board leases the parish school house and conducts public schools therein, need not necessarily interfere with the board's substantial compliance with the plan proposed although a valid and binding contract to do all the things contained in the bishop's proposal would be beyond the powers of the board to make.

Courts that have been called upon to pass upon the question, have, without exception, so far as I have found, held that the necessary use of a portion of a church or other sectarian building for public school purposes, so long as the school conducted therein by public authorities does not bring the pupils under sectarian influence or the payment of rent therefor is not an appropriation or aid to the church or a sectarian school within the meaning of constitutional prohibitions of such aid as is contained in Section 2 of Article VI of the Constitution of Ohio, to the effect that

> "No religious or other sect or sects shall ever have any exclusive right to, or control of, any part of the school funds of this state."

And in Section 7 of Article I of the Constitution of Ohio, which provides inter alia:

> "No person shall be compelled to attend, erect or support any place of worship or maintain any form of worship against his consent; and no preference shall be given by law, to any religious society; nor shall any interference with the rights of conscience be permitted."

Millard vs. *Board of Education,* 19 Ill. App. p. 48; same case on appeal 121 Ill., 297; *Ex rel. Conway* vs. *Joint School District,* 162 Wis. 482; *Swadley* vs. *Haynes* (Tenn.) 41 S. W. 1066; *Dorner* vs. *School District,* 137 Wis. 147; R. C. L. Vol. 24, p. 664; note L. R. A. 1917d 462; note 105 A. S. R. 157.

In the case of *Knowlton* vs. *Baunhover,* 182 Ia. 691, 166 N. W. 202, an injunction was issued enjoining a public board of education from expending public funds for the maintenance of a school in a building belonging to a church, but under the facts of that case it appeared that the school in question was conducted practically as a parochial school and the pupils were by reason of the operation of the school in the manner in which it was conducted, placed under the sectarian influence of the church, the room being left in charge of members of a religious order who regularly gave instruction in their particular faith.

In the case of *Millard* vs. *Board of Education, supra,* it was held that the payment of rent to a church organization for the use of a room in the basement of the church for school purposes was not such an appropriation or aid to the church as to come within the constitutional prohibition upon such aid, since the pupil in such a case receives the full benefit of its contract and the funds paid are not a gift, appropriation or aid to the church, nor paid for any sectarian purpose. The case was affirmed on appeal, the court saying:

> "As to the first allegation, that the schools have been maintained in the basement of a Catholic church, no importance whatever can be attached to a fact of that character. If the district where the school was maintained had no schoolhouse, and it became necessary for the board of education to procure a building to be used for school purposes, they had the right to rent of any person who had property suitable for school purposes, and whether the owner of the property was a Methodist, a Presbyterian, a Roman Catholic, or of any other denomination, was a matter of no moment; nor was it material that the building selected had been used as a church."

In *State ex rel. Conway* vs. *Joint School District, supra,* it was held that the use of a church building in which to hold graduation exercises which are a part of the school curriculum, and under the control of the school board, without payment for such use, does not compel parents of pupils to attend a place of worship, within the meaning of a constitutional provision which reads as follows:

> "The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or

modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

The court said:

"When the Constitution protects the individual from being compelled to attend a place of worship, it undoubtedly means that he shall not be required to attend a place where religious instruction is being given at the time he is required to be present. It protects a man from being obliged to attend the services of the Salvation Army in our public streets, or from being compelled to enter a hall or opera house while such services are being carried on, just as much as it does against being forced to enter a church. It is what is done, not the name of the place where it is done, that is significant."

With respect to the employment of Ursuline Sisters or nuns as teachers in the public schools, there is some conflict of authority among courts that have been called upon to pass upon the question. Under a constitution and a statute such as exists in Ohio which do not prescribe any religious belief as a qualification of a teacher in the public schools, there would be no question but that the school authorities may select a teacher who belongs to any church, or no church, as they think best. (See *Millard* vs. *Board of Education. supra.)* The difficulty arises, and it is this that has occasioned the conflict of opinion among jurists, with respect to the wearing in the school room by teachers of a distinctive religious garb peculiar to their order.

In *O'Connor* vs. *Hendrick,* 184 N. Y. 421, it was held that the state superintendent of public instruction had the power to order that a distinctive religious garb should not be worn by teachers in the class-room and that it should be discarded by them on penalty of dismissal. The court said that the distinctive religious costume of teachers who were members of a religious society connected with the Roman Catholic Church worn at all times in the presence of their pupils, would tend to inspire respect, if not sympathy, for the religious denomination to which they so manifestly belonged, and to that extent the influence was sectarian, even if it did not amount to the teaching of denominational doctrine. (See also *Knowlton* vs. *Baumhover, supra.)* The opposite view was taken in the case of *Hysong* vs. *Gallitzin School District,* 164 Pa. 629. Following the decision in the Hysong case the legislature of Pennsylvania enacted a statute which provided:

"No teacher in any public school in this commonwealth shall wear in said school or whilst engaged in the performance of his or her duty as such teacher any dress, mark, emblem or insignia indicating the fact that such teacher is a member or adherent of any religious order, sect or denomination."

This statute was held to be constitutional in the case of *Commonwealth* vs. *Herr,* 39 Pa. Sup. Ct. 454, which judgment was affirmed in 229 Pa. 132, on the opinion of the lower court.

While the courts of Ohio have not passed upon this particular question, the above cases, in my judgment, properly express the constitutional and legal restrictions in Ohio.

In conclusion, I am of the opinion that the Board of Education of the Tiffin City School District, if it is deemed by the said board to be in the interests of the education of the youths within the school district and for the best interests of the public school system in the district, may lawfully lease the rooms and building in which parochial schools are now being conducted, regardless of who owns the rooms or buildings, for the purpose of conducting public schools therein; that public schools may be conducted by the board of education in the rooms so leased, and that any individual may be employed to teach in these public schools, providing they have been properly certificated. Pupils formerly attending the parochial schools may be assigned by the superintendent of schools to the public school within the district which, in the superintendent's opinion is best suited to the pupil's age and state of advancement and vocational interest. It is not lawful for the board of education to bind itself by contract at the time of leasing the schoolrooms to employ certain teachers to teach the public schools to be conducted in the room so leased, or to permit certain pupils to attend certain schools regardless of the school to which they may be assigned by the superintendent.

Respectfully,
JOHN W. BRICKER,
Attorney General.

1833.

APPROVAL, BONDS OF BAY VILLAGE SCHOOL DISTRICT, CUYAHOGA COUNTY, OHIO—$22,375.43.

COLUMBUS, OHIO, November 8, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1834.

APPROVAL, BONDS OF NEW LATTY VILLAGE SCHOOL DISTRICT, PAULDING COUNTY, OHIO—$3,000.00.

COLUMBUS, OHIO, November 8, 1933.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.