And he concluded (page 473 that:

"A complete revision and overhaul of the amount and power to assess costs and attorney fees in all Michigan courts is overdue. * * *."

In summary, it is my opinion that all sums received by any person by way of a pension, annuity, retirement allowance, optional benefit or any other benefits accruing to such person pursuant to Section 25, Chapter I of the state teachers retirement act, supra, are exempt from state income taxes and persons receiving retirement benefits from the Michigan public school retirement system may exclude such sums in determining their adjusted gross income. On the other hand, there is no exemption from the state income tax act of 1967, supra, for sums received by persons pursuant to provisions of Chapter II of the state teachers retirement act and, therefore, for persons receiving retirement benefits from the employees retirement system of the school district of the City of Detroit.

In closing, the following observations appear appropriate. The people have entrusted the power to make laws to the legislature. The attorney general is bound by his constitutional oath to interpret the law as enacted by the legislature. Only the legislature can remedy the apparent inequity in the matter of exemption of public employee retirement benefits from the provisions of the Michigan income tax law. The legislature should, at its earliest opportunity, study this matter and take such action as it considers equitable.

FRANK J. KELLEY,
Attorney General.

690224.4

SCHOOLS: Authority of boards of education to grant certain sick leave benefits.

Boards of education have statutory authority to allow individual public school employees to accumulate unused sick leave days from year to year to be used for periods of illness in subsequent years. Boards of education have statutory authority to pay a specified amount per unused sick leave day at retirement to their employees.

No. 4667 February 24, 1969.

Hon. Ray Smith
State Representative
The Capitol
Lansing, Michigan

You have requested my opinion on three questions, two of which are related. Only these two will be considered in this opinion. Since the other issue you have raised deals with a basically unrelated subject, it will be answered in a separate opinion.

The two related questions you have presented are:

"Does the Board of Education have the authority to pay an employee, at the time of termination of employment for retirement, a specific amount per unused sick leave days?

> "Does a Board of Education have the authority to create a sick leave bank where individual teachers contribute to the bank, then any member of the bank can use sick leave days from the bank beyond the individual's sick leave accumulation?"

In O.A.G. No. 4583, issued October 11, 1968, I recently considered the statutory authority of boards of education to pay certain types of fringe benefits, including sick leave benefits, to their employees. That opinion held that the express statutory authority of boards of education to pay their employees compensation[1] included the implied power to allow their employees temporary absences due to illness without loss of pay but, for reasons stated therein, that there was no implied power for the payment of unused sick leave at the end of each school year or upon termination of employment.

That opinion, at pages 8 and 9, also contained the following express reservation:

> "This opinion does not pass on the questions of whether sick leave days may be accumulated from year to year and whether accumulated sick leave days may be paid at retirement since these questions are not posed."

Implicit in your initial question is the assumption that boards of education possess statutory authority to allow their employees to accumulate unused sick leave from year to year. In responding to this portion of the question, it must be observed that boards of education have only such powers as are expressly or by reasonably necessary implication conferred upon them by statute. *Jacox v. Board of Education of Van Buren Consolidated School District* (1940), 293 Mich. 126, 128; *Senghas v. L'Anse Creuse Public Schools* (1962), 368 Mich. 557, 560. Although there is no express statutory provision authorizing school boards to grant sick leave benefits to their employees, the case of *Averell v. City of Newburyport* (Mass. 1922), 135 N.E. 463, holds that the statutory authority to fix teachers' salaries includes the implied power to allow temporary absences due to illness without loss of pay as a means of promoting efficiency and constancy of excellent service on the part of teachers.

The accumulation of unused sick leave days from year to year by an individual employee appears to be a reasonably necessary concomitant of the implied power of boards of education to grant temporary absences due to illness without loss of pay. The accumulation of unused sick leave encourages and rewards a judicious use of sick leave days by the employee. Further, the accumulation of unused sick leave furnishes the employee incentive to retain his public school employment by a particular school district. Moreover, the yearly accumulation of unused sick leave is within the concept of allowing temporary absences due to illness without loss of pay since the accumulated sick leave of an employee merely represents the aggregate of those sick leave days an employee was entitled to use, but did not use, in each preceding year of employment.

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[1] Section 574 of Act 269, P.A. 1955, as amended, being M.C.L.A. § 340.1 et seq.; M.S.A. 1968 Rev. Vol. § 15.3001 et seq.

In summary, it must be concluded, as a logical extension of the holding in *Averell v. City of Newburyport,* supra, that the implied power to allow public school employees to accumulate unused sick leave from year to year is clearly reasonably necessary to enable boards of education to *hire* and *retain* public school employees. Therefore, it is the opinion of the Attorney General that boards of education have implied statutory authority, in granting sick leave benefits, to allow individual public school employees to accumulate unused sick leave days from year to year to be used for periods of illness in subsequent years.

Turning to the issue of payment of a specific amount per unused sick leave day at retirement, it must be recognized that this payment is beyond the holding in *Averell v. City of Newburyport,* supra, since in this situation there is no absence due to illness. However, the legislature has provided retirement systems for public school employees in Act 136, P.A. 1945, as amended, being M.C.L.A. § 38.201 et. seq.; M.S.A. 1968 Rev. Vol. § 15.893(1) et. seq. The Michigan Supreme Court has indicated that the purpose of retirement benefits is to encourage continuous service in public employment. *Bower v. Nagel* (1942), 228 Mich. 434; *Attorney General v. Connolly* (1916), 193 Mich. 499, 513. The payment of a specified amount per unused sick leave day at retirement also encourages public school employees to retain their public employment by a particular school district and is, therefore, consistent with the legislative policy expressed in providing retirement systems for public school employees. In addition, such payments reward a judicious use of sick leave days by employees while they are engaged in public school employment.

Thus, the conclusion is compelled that the implied power to pay for unused sick leave at retirement is reasonably necessary to enable boards of education to *hire* and *retain* public school employees. It is the opinion of the Attorney General that boards of education have implied statutory authority to pay a specified amount per unused sick leave day at retirement to their employees.

Regarding your second question, I must inform you that this issue is involved in litigation pending in the Genesee County Circuit Court. *Rayburn, et. al. v. Board of Education of the Mt. Morris School District,* Docket No. 13414. Since a judicial decision will soon be forthcoming relating to this issue, it is inappropriate for me to answer this question.

However, it is pertinent to mention that in Section 617 of Act 269, P.A. 1955, as amended, supra, the legislature has conferred discretionary authority upon boards of education to provide insurance protection on a joint participating or non-participating basis for school district employees. This insurance protection includes "health and accident type coverage" for school district employees only. O.A.G. No. 4170, 1963-64, p. 195.

The phrase "health and accident type coverage" is given meaning by reference to the Insurance Code of 1956, Act 218, P.A. 1956, as amended, being M.C.L.A. § 500.100 et seq.; M.S.A. 1957 Rev. Vol. § 24.1100 et seq. An examination of Section 606 and Chapters 34 and 36 of the Insurance Code of 1956, supra, reveals that the statutory phrase "health and accident type coverage" falls within the area of disability insurance which includes disability on account of sickness or accident. Thus, it is clear that the

legislature has granted boards of education the statutory authority to pay all or a portion of the premium on a policy of disability insurance that will furnish financial protection to their employees in cases of extended absence on account of sickness or accident.

FRANK J. KELLEY,
Attorney General.

690411.1

SCHOOL DISTRICTS: Board of Education—Teachers.

There is no legal prohibition against the same individual simultaneously serving as a member of a board of education in one school district and teaching in another school district.

No. 4598

April 11, 1969.

Hon. Allen F. Rush
State Representative
The Capitol
Lansing, Michigan

You have requested my opinion on a question which may be phrased as follows:

> Is there any legal prohibition against the same individual simultaneously serving as a member of a board of education in one school district and teaching in another school district?

This question necessitates consideration of two potentially relevant legal doctrines, incompatibility of public office and conflict of interest. I will first discuss incompatibility of public office.

An examination of Act 269, P.A. 1955, as amended, being M.S.A. 1968 Rev. Vol. § 15.3001 et seq.; M.C.L.A. § 340.1 et seq., known as the School Code of 1955, reveals no express statutory provision either prohibiting or authorizing the conduct in question. Thus, recourse must be had to the common law doctrine of incompatibility of public office.

Two public offices are incompatible and may not be simultaneously occupied by the same person when one office is subordinate to the other and subject to its supervisory power in some degree or when the functions of the two offices are inconsistent and repugnant to one another. Under the common law doctrine of incompatibility of public office, the acceptance of a second and incompatible public office serves to vacate the first public office. *Attorney General ex. rel. Moreland v. Common Council of the City of Detroit* (1897), 112 Mich. 145; *Weza v. Auditor General* (1941), 297 Mich. 686.

It is clear that a member of a board of education is holding a public office. In contrast, public school teachers are public employees. *Attorney General v. Board of Education of the City of Detroit* (1923), 225 Mich. 237. However, the incompatibility doctrine has been extended to cover public employment or position as well as public office. *Knuckles v. Board of Education of Bell County* (Ky. 1938), 114 S.W. 2d 511, and O.A.G. No. 4309, 1963-64, p. 459. Consequently, the question arises as to whether an in-