STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

for the calender years

1961 - 1962

lem. Annotation 79 A.L.R. 2d 1148. In those states which do permit such leasing during non-school hours, the courts indicate that the school board must insure that there is no abuse of discretion. The court stated in *Southside Est. Bapt. Church v. Trustees,* (Florida), 115 So. 2d 697:

> "We, therefore, hold that a Board of Trustees of a Florida School District has the power to exercise a reasonable discretion to permit the use of school buildings during non-school hours for any legal assembly which includes religious meetings, *subject, of course to judicial review* should such discretion be abused to the point that it could be construed as a contribution of public funds in aid of a particular religious group or the promotion or establishment of a particular religion." (Emphasis supplied)

In determining whether or not there has been an abuse of discretion in renting the public building for private use, the courts use various criteria; does the private use of the building interfere with the operation of the school system; is a fair rental paid for the private use; have a majority of the taxpayers in the school district authorized the rental or lease; is the public building available to all denominations; is the use temporary or under a long term lease.

Traditionally in this State the superintending school committee has general management and control of the public schools in its own towns. Section 54 of Chapter 41, Revised Statutes of 1954, prescribes the duties of the superintending school committee as follows:

> "1. The management of the schools and custody and care, including repairs and insurance on school buildings, of all school property in their administrative units."

It is well known that many towns permit use of public buildings for private functions either gratis or under a rental arrangement. I do not find in the case law of this State a prohibition against the lease of a public school prior to or after regular school hours. I do not find a statute in our State which forbids such a lease. Section 147 of Chapter 41 providing for release time during regular school hours for religious instruction does not prohibit such a lease agreement.

The lease agreement does not violate the state or federal constitution. There is no expenditure of public monies to support a particular religious denomination. There is no inculcation of a captive audience of students by a public school teacher during regular school hours of a particular religious doctrine.

The problem is primarily one for a court, i.e. whether or not there has been an abuse of discretion by the town in leasing a public building under authority of Section 54 of Chapter 41, supra.

RICHARD A. FOLEY

Assistant Attorney General

July 10, 1962

To: Paul A. MacDonald, Secretary of State

Re: Vacancy in office of County Commissioner

The facts as stated are that a vacancy has occurred in the office of a county

commissioner four days prior to the primary election in June. Two questions are raised:

(1) Can a person be placed on the ballot for the November election for the office of County Commissioner?

(2) If the answer is in the negative, will the person appointed by the Governor and Council to fill the vacancy serve until January 1, 1965?

Revised Statutes, 1954, Chapter 89, Section 2, provides that the term of office of a county commissioner shall be 6 years, except when one is elected to fill out an unexpired term.

Section 3 of the same chapter reads:

> "When no choice is effected or a vacancy happens in the office of county commissioner by death, resignation or removal from the county, the governor with the advice and consent of the council shall appoint a person to fill the vacancy, who shall hold office until the 1st day of January after another has been chosen to fill the place."

It is obvious from the above section that the governor and council shall first fill the vacancy. At the time this section was enacted over a hundred years ago, the state had annual elections. The section has not been changed since it appeared in the Revised Statutes of 1857.

Section 5 of the same chapter as amended by Public Laws 1959, Chapter 204, Section 30, says "County Commissioners shall be elected on the Tuesday following the first Monday of November in each even-numbered year by the written votes of electors qualified to vote for representatives."

Sections 37 through 50 of Chapter 3-A as enacted by Public Laws 1961, Chapter 360, cover primary nominations and placing a name on the general election ballot by petition. These sections do not govern situations where a vacancy is created just prior to the primary when it is too late to be a primary candidate. Neither do they cover a situation where the vacancy occurs after the primary election.

Section 179 covers vacancies in the *nominated* office of United States Senator, Representative to Congress or Governor at least 60 days before the general election. Section 180 covers vacancies in the same *nominated* offices less than 60 days before the general election.

Section 181 covers vacancies in other offices *nominated* at a primary. Section 186 covers a vacancy in the office of Representative to the Legislature. Section 187 covers a vacancy in the office of State Senator. Section 188 covers a vacancy in the office of Representative to Congress. Section 189 covers a vacancy in the office of United States Senator. Section 190 covers a vacancy in the office of presidential elector.

The above sections are the only ones which deal with placing names on general election ballots when a vacancy exists. Not one of them provides for placing a name of a candidate for county commissioner, or any county office, on the general election ballot where a vacancy is created so close to the primary as to make it impossible to get a name on the primary ballots or after a primary election.

Therefore, it follows that there is no way whereby the vacancy can be filled, by election, at the general election in 1962.

The person appointed by the Governor and confirmed by the Council will serve until January 1, 1965.

GEORGE C. WEST
Deputy Attorney General

August 7, 1962

William W. Dunn, Principal
Kents Hill Preparatory School
Kents Hill, Maine

Dear Sir:

In confirmation of our recent telephone conversations, I am writing to you to clarify the position of this office in relation to the additional fee charged to the parent of a student when the student is resident in a Town which does not maintain a secondary school gains admission to Kents Hill.

The first sentence of section 107, Revised Statutes, chapter 41, provides as follows:

> "Any youth whose parent or guardian maintains a home for his family in any administrative unit which does not support and maintain an approved secondary school may attend any approved secondary school to which he may gain entrance by permission of those having charge thereof."

The next paragraph of section 107 reads as follows:

> "In the case of any youth attending school, *under conditions as provided for in the preceding paragraph,* in schools in which the average daily membership, as reported in the preceding year, is 100 or more students, and the school offers at least 2 occupational courses, the annual tuition shall not exceed . . . . (The legal tuition rate)." (Emphasis ours)

When an Academy accepts students from a Town which does not maintain a secondary school, then the Academy for the purposes of receiving tuition from the sending Town is deemed to be a public school and any additional charge to the parent of such a student in the form of tuition is in contravention of the statute.

Since the legal tuition rate is $463.56 and the average cost per pupil at Kents Hill is $717.56, I can well understand your position in this matter but the law appears to be clear on the subject.

Very truly yours,

RICHARD A. FOLEY
Assistant Attorney General

August 8, 1962

To: Steven D. Shaw, Administrative Assistant, Executive Department

Re: International cooperation

We have your request for an opinion with regard to the limitations imposed upon the Chief Executive of the State of Maine in his negotiations with the