

**PHILIP A. AMICONE
MAYOR**



**CITY HALL
YONKERS, NEW YORK 10701-3883**

**PHILIP A. ZISMAN
INSPECTOR GENERAL**

**Ph: 914-377-7000
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**DEPARTMENT OF
INSPECTOR GENERAL
CITY OF YONKERS**

TO: Chuck Lesnick, City Council President
Sandy Annabi, Majority Leader and Education Committee Chair
Liam McLaughlin, Minority Leader and Budget Committee Co-Chair
Patricia McDow, Budget Committee Co-Chair
All City Council Members

FROM: Philip A. Zisman, Inspector General *PAZ*

SUBJECT: The Inspector General's Independent Authority
Over School District Matters

DATE: July 28, 2009

I submit this memorandum in support of my appearance before the City Council's joint Budget and Education Committee on July 28, 2009.

There are two basic issues that I will present when I appear before the Committee: First, I will discuss the legal question that is at the heart of my office's dispute with the Board of Trustees. I have asserted that the Inspector General has the independent authority as set forth in the City Charter and case law of the New York State Court of Appeals to conduct audits and investigations at the School District. The Board asserts that the IG does not have this power. Second, I will show, as apparent from the history outlined below, that the Board has not cooperated with my office's efforts to review the District's health insurance payments and health and welfare fund payments.

I believe that it is essential to resolve the question of whether the Inspector General has independent authority to conduct investigations and audits at the School District. I am prepared to request that the City's Corporation Counsel's Office seek a declaratory judgment in New York State Supreme Court to finally resolve this question.

Chronology of the Inspector General's Dispute with the Yonkers Public Schools Board of Trustees over the IG's Authority to Conduct Independent Audits and Investigations

May 15, 2006

Based on the KPMG Management Report, as Inspector General I sent a memorandum to the Board of Education recommending, among other things, that the IG's Office conduct a review of the School District's fringe benefit payments. (Fringe benefits include health insurance payments.) (Exh "1")

June 21, 2006

I appeared before the BOE's Audit, Budget and Finance Committee and recommended that the IG conduct six audits and reviews, including the fringe benefit payment review, that are set forth in the May 15, 2006 memorandum.

June 27, 2006

Follow up memorandum to the BOE regarding the recommended six audits. (Exh. "2")

July 11, 2006

I met with Superintendent Pierorazio to discuss IG work at the School District and also discussed the fact that the Board has not responded to my audit recommendations.

February 14, 2007

Zisman memorandum to the Board regarding the Mayor's request that the IG's Office conduct a review of the School District's purchasing department. (Exh. "3") Thereafter, Mr. Pierorazio told me that the Board did not agree to this audit, and the Mayor withdrew his request.

October 5, 2007

While at School District headquarters, I met Board President Bernadette Dunne, who gave me a copy of the D'Arcangelo Risk Assessment Analysis, a 48 page report, and asked me to critique it. The Risk Assessment Analysis provided a plan for the District to manage the administrative risks that were found in 15 different "business units" within the School District. The report classified risk levels from high to low in the Districts' administrative operations and called for numerous audits to ensure the existence of adequate internal controls of the areas at risk over a four year period. This important report has never been released to the public.

January 4, 2008

Zisman memorandum to the BOE critiquing the Risk Assessment Analysis. (Exh. "4") I recommended that the IG conduct a review of the purchasing department and fringe benefit payments. We originally recommended these reviews in 2006. I also outlined other work that would be appropriate for the IG's Office based on the findings in the Risk Assessment Analysis.

February 7, 2008

Memorandum from President Dunne in response to my memorandum of January 4, stating that the IG's services were not required at this time. (Exh. "5")

February 21, 2008.

Zisman memorandum requesting a meeting with the BOE pursuant to the Board resolution which requires the IG to report to the Board on a regular basis. (Exh. "6") The Board did not respond to this request.

March 7, 2008

In a meeting with Superintendent Pierorazio and District CAO Joseph Bracchitta, Mr. Pierorazio told me that the Trustees asked the D'Arcangelo firm to audit payroll and purchasing. The D'Arcangel audit was not scheduled to include a review of health insurance payments. Mr. Pierorazio said he would speak to the Board again about the IG auditing these payments.

September 17, 2008

In a meeting with Mr. Pierorazio, Joe Bracchitta, Stan Bronski, Assistant Superintendent for Finance, and Mike Lisa of the D'Arcangelo firm we discussed the IG's proposed health insurance payment audit. Mr. Pierorazio asked if the audit would include the payments to the Unions' health and welfare funds. I said that we could incorporate that into our review and would have the authority to request and, if necessary, subpoena records from the Unions. The D'Arcangelo firm does not have the legal authority to audit the Unions' records. Mr. Pierorazio said he would speak to the BOE about such an audit. Later, Mr. Pierorazio informed me that the Board would not approve the IG's audit.

December 1, 2008

I determine that the IG's Office will go forward with the health insurance audit despite the Boards' opposition. Zisman memorandum to the BOE announcing that the IG's Office will conduct a review of the District's health insurance payments. (Exh. "7 ")

December 15, 2008

At a meeting, the Superintendent informed me that the BOE did not want the IG to conduct the announced audit and that the D'Arcangelo firm was now conducting the health insurance payment review. Mr. Pierorazio stated that he would speak to the BOE about the IG conducting an audit of the District's health and welfare fund payments. Through the Superintendent's office, we schedule an appointment for January 15, 2009 to speak with human resources employee Kathy Ennis who, Mr. Pierorazio told us, was responsible for administering the health and welfare payments. The Superintendent's office later cancelled the appointment.

January 21, 2009

The BOE adopted Resolution No. 09-1-257c, which attempts to eliminate the IG's independent authority to conduct audits and investigations at the School District. (Exh. "8")

April 9, 2009

Zisman memorandum to the BOE asserting that Res. No. 09-1-257c was procedurally and substantively defective, and that my office intended to go forward with the health insurance payment audit. (Exh. "9" (without exhibits that are attached as separate exhibits herein))

April 28, 2009

Letter of BOE President Sudick asserting that the School District is not a department of the City. (Exh. "10")

May 1, 2009

A statement of the Superintendent on behalf of the BOE, in which the Trustees were prepared to invite the IG to participate in the health insurance cost audit. (Exh. "11")

May 5, 2009

Zisman memorandum in response to the April 28 and May 1 communications. (Exh. "12") This memorandum set forth the legal argument in support of the IG's independent authority at the School District, and corrected factual inaccuracies in the BOE communications.

Letter of Superintendent Pierorazio to the City Council leadership. (Exh. "13")
This letter is significant because Mr. Pierorazio stated that he has invited the IG to participate in the health insurance cost audit.

May 6, 2009

Zisman memorandum to F. Rubino requesting a legal opinion on the authority of the IG to conduct independent audits and investigations at the School District. (Exh. "14")

May 12, 2009

Meeting with J. Bracchitta, J. D'Arcangelo and M. Lisa regarding the scope of work of the audit. It was agreed that 1) the IG would conduct a review of the health and welfare fund payments and that we would set up a meeting with appropriate District staff; 2) the D'Arcangelo firm would conduct a payroll and human resources audit that would include a review of the health insurance payments. D'Arcangelo would provide a draft letter detailing the scope of their work on the health insurance payments, that the IG would review and comment on; 3) D'Arcangelo and the IG would appear before the Trustees Audit, Budget and Finance Committee to explain our agreement.

May 26, 2009

Email exchange between Bracchitta and Zisman as a follow up to the May 12, 2009 meeting. (Exh. "15") This email confirmed that we were to review a letter from the D'Arcangelo firm.

May 28, 2009

Pierorazio memorandum outlining the scope of D'Arcangelo's work. (Exh. "16")
This memorandum mischaracterized our agreement from May 12, 2009.

Zisman email to Pierorazio responding to the May 28th memorandum. This email set forth what was actually agreed to on May 12, 2009. (Exh. "17")

June 3, 2009

IG meeting with School District staff including Marta Lugo, HR Director, Diane Franks, Civil Service Director, Stan Bronski, Assistant Superintendent of Finance. This was the first meeting in our audit of the District's health and welfare fund payments. Dr. Lugo provided us with copies of all Union contracts, and we requested specific documents that would be the subject of our review. This meeting was scheduled through the Superintendent's office.

June 4, 2009

Zisman email to Bracchitta requesting documents that were discussed at the previous day's meeting. (Exh. "18")

Zisman email to D'Arcangelo regarding IG's review of health and welfare fund payments. (Exh. "19")

June 17, 2009

Zisman second request to Rubino for a legal opinion. (Exh. "20")

June 23, 2009

Meeting with Superintendent and J. Bracchitta. Superintendent stated the Trustees told him that he did not have the authority to allow the IG to conduct an audit of the health and welfare fund payments, and that the District would not be providing the requested documents. I stated that we intended to go forward with the audit that we had started and would serve a subpoena for the documents if necessary.

June 25, 2009

President Dunne memorandum and press release, stating that the IG's attendance at a meeting with District staff was not authorized, even though the Superintendent's Office scheduled the meeting. (Exh. "21")

June 26, 2009

Zisman memorandum and IG subpoena. (Exh. "22"). The subpoena was served on Monday June 29, 2009, for the records that we originally requested on June 4, 2009.

July 14, 2009

Zisman memorandum to F. Rubino requesting the Law Department file a motion in Supreme Court to compel compliance with the IG's subpoena. (Exh. "23")

July 15, 2009

The Board of Trustees adopted Resolution 09-7-1A, rescinding the designation of the City's Inspector General as the Inspector General for the Yonkers Public Schools. The resolution states that the BOE "has determined that the services can best be provided by the Board's own internal, external and claims auditors." (Exh. "24")

July 24, 2009

Corporation Council delivers documents to the Inspector General's Office received from the School District.

July 27, 2009

Email exchange of Phil Zisman, Frank Rubino, and Council Member Liam McLaughlin regarding the ongoing dispute between the Inspector General's Office and the Board of Trustees. (Exh. "25")

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**DEPARTMENT OF
INSPECTOR GENERAL
CITY OF YONKERS**

TO: Bernadette Dunne, President of the Yonkers Board of Education
Bernard Pierorazio, Superintendent of Schools
All Board of Education Trustees

CC: Philip A. Amicone, Mayor

FROM: Philip A. Zisman, Inspector General

SUBJECT: KPMG Management Report

DATE: May 15, 2006

I have now had the opportunity to review the KPMG audit report. As you know, KPMG found that the District's administrative processes and procedures are inadequate and require a comprehensive overhaul. The report focuses on the District's need to upgrade its information and accounting systems, and KPMG's overarching recommendation is that the District either implement a new Enterprise Resource Planning system or work with the City to implement a shared services environment for Finance, Budget, Food Services, Procurement, Payroll, and Human Resources.

I am aware that the Board is working with the Mayor and Superintendent to address the concerns of the report, and that money has been appropriated in the City's proposed 2007 capital budget to purchase an integrated accounting system that will be used by both the City and the District. Also, the City and the District are moving forward on plans to integrate some administrative functions.

The systemic changes recommended in the report will, however, take time to implement. In the interim, it is important that the District put in place a plan to ensure the integrity of its ongoing operations. As Inspector General for the School District, I believe that my Office can be of assistance to the Board in addressing some of the issues raised by KPMG.

Set forth below is a list and brief description of projects that would be appropriate for the Inspector General's Office:

Fringe Benefits

The District pays over \$100 million each year in employee benefits, which includes \$50 million for health insurance. KPMG refers to this large expense and recommends that employees contribute to the cost of their health insurance. KPMG also questions the District's policy regarding payments to employees who opt out of receiving District health insurance.

In 2004, the IG's Office conducted a review of the City's fringe benefits and found a number of opportunities for cost savings. (A copy of the report is available on the Inspector General's web page on cityofyonkers.com.) A similar review of the District's fringe benefit accounts would determine whether there are adequate internal controls in the benefits programs and identify possible cost savings.

Adult Education

KPMG estimated that the Adult Basic Education ("ABE") program incurred a projected deficit of approximately \$800,000 and that the District subsidizes ABE by at least \$458,543 (this does not include health insurance). The KPMG findings are in sharp contrast to the program director's representation that the programs are essentially self-funded.

In order to ensure the integrity of the program, we believe a detailed review is appropriate. It would include a review of attendance, staffing and grant fund revenue, and provide specific recommendations as to how budgeting and accounting can be improved.

Contract Monitoring

KPMG found that the District has no formal process for conducting due diligence with respect to the procurement process. For several years the IG's Office has attempted to put in place a contract monitoring program with the District, but we have met with only limited success. The program we recommend includes vendor background checks and follow up contract audits. We currently perform this service for the City.

In recognition of the need to improve construction oversight, we have recently been working with John Carr, Assistant City Engineer in charge of School District Facilities. In the wake of the KPMG report, Mr. Carr has requested that the IG's Office formalize its involvement in the contracting process, and specifically take on the responsibility of conducting prevailing wage and hour reviews of construction contractors' certified payrolls, and other reviews and investigations as required.

Employee Reimbursements

As described in Exhibit 3 on pages 55 and 56 of its report, KPMG reviewed employee reimbursements. In a sample of 56 vouchers for employees who received multiple reimbursements totaling over \$2000, the auditors found that 44 of the vouchers had "written changes to the values on the voucher without signed approval for the changes." The auditor also found that reimbursement claims were incomplete and in some cases "not available for review." Also, because reimbursement policies and procedures are not documented, the District is vulnerable to abuse or fraud in reimbursements.

It is apparent from these findings that a further review of employee reimbursements is appropriate to ensure the integrity of the process. Such a project would include identifying appropriate policies, procedures and internal controls to ensure the accuracy of these payments.

Payroll

KPMG found significant problems with the District's manual payroll operations. One of the many recommendations is for the District to eliminate the vacation buy-back policy as a cost saving measure. Given the current vulnerability of the payroll system to error and fraud, an IG audit of specific aspects of the payroll process would help provide recommendations for internal controls to better ensure the integrity of the ongoing payroll process. Areas appropriate for review include vacation buy-back, termination pay, and overtime.

Transportation

KPMG found that the schools do not reconcile the monthly bus pass sales, and that a process for verifying the appropriate fee to charge each student does not exist. An IG analysis of the monthly fees charged and actual cash receipts received would lead to improved internal controls over these funds.

* * * * *

Please contact my office if the Board would like to discuss these matters further.

**PHILIP A. AMICONE
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**DEPARTMENT OF
INSPECTOR GENERAL
CITY OF YONKERS**

TO: Bernadette Dunne, President of the Yonkers Board of Education
All Board of Education Trustees

CC: Bernard Pierorazio, Superintendent of Schools

FROM: Philip A. Zisman, Inspector General

SUBJECT: June 21st Audit, Budget and Finance Committee Meeting

DATE: June 27, 2006

I write as a follow up to my appearance before the Board's Audit, Budget and Finance Committee on June 21, 2006.

First, I would like to thank the Board for inviting me to speak. In addition to discussing my May 15, 2006 letter to the Board regarding the KPMG audit report, the meeting gave me an opportunity to meet new Board members and to provide an overview of the Inspector General's Office. I hope that this background information helped the Board to better understanding the evolving role of the Inspector General in the School District.

Second, in the wake of the KPMG audit, I believe that it is important for the Board to implement a plan that helps insure the integrity of the ongoing operations of the District. As part of that plan, I recommend that the Board authorize the Inspector General to conduct the six audits/reviews that are outlined in my May 15, 2006 letter. I believe that these audits/reviews are appropriate next steps given the specific findings of KPMG, and are also projects that are appropriate for the Inspector General's Office, subject to the availability of adequate resources.

As I stated in our meeting, I have been working with Superintendent Pierorazio on a number of ongoing investigations, and have also been working with City Engineer John Carr on construction contract matters. I hope to meet

with Mr. Pierorazio in the near future to discuss these ongoing activities and to formalize our cooperative efforts.

Finally, with respect to the six proposed audits/reviews, because the Inspector General's Office has a small staff and otherwise limited resources, it is not feasible for my office to work on more than one or two of these projects at one time. As the Board considers how to best respond to the KPMG findings, I believe it should strongly consider increasing the resources available to the Inspector General to conduct work for the District. This could include increased staffing dedicated to School matters which would allow our office to establish a full time Inspector General presence at School District headquarters.

I am available to discuss these matters further, or can submit more specific proposals regarding Inspector General activity, as requested by the Board. Also, if any Board member has any specific questions or concerns please do not hesitate to contact me.

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DEPARTMENT OF
INSPECTOR GENERAL
CITY OF YONKERS

TO: Bernadette Dunne, President Yonkers Board of Education
All Board of Education Trustees

FROM: Philip A. Zisman, Inspector General

CC: Philip A. Amicone, Mayor
Bernard P. Pierorazio, Superintendent of Schools

SUBJECT: Review of Purchasing

DATE: February 14, 2007

Mayor Amicone has requested that the Inspector General's Office conduct a review of the City and School District's purchasing departments to assess operations and make recommendations as to how School and City procurement can be more efficient and cost effective. He also wants our assessment of whether it would be beneficial to consolidate the two purchasing functions. I write to explain the nature of the review that my office intends to conduct.

Rationale

The City and School District's purchasing departments are both subject to the same New York State laws governing procurements. Under these laws the departments have the same mandates – to obtain fair and reasonable prices for high quality goods and services that are delivered on a timely basis. Moreover, public policy requires that municipal entities treat vendors fairly, and that the procurement process be open and transparent.

The City and School District's purchasing departments have developed separate and distinct operating policies and procedures. Both entities would benefit from a review of their operations with an analysis that compares each department to its City or School District counterpart. Moreover, given that these

departments essentially perform the same function, it is logical to determine whether there are potential cost savings from combining them.

The Inspector General's Office has broad experience in the review of City and School District purchasing operations. As an ongoing function, the IG regularly reviews the City's procurement process as well as individual contracts. Also, since 1999, we have conducted a series of reviews of the School's contracts and procurement matters.¹ We are knowledgeable about the legal requirements as well as the practical aspects of the procurement process. We are also very familiar with the operations of both the City and School District purchasing departments. Thus, the Inspector General's Office is particularly well suited to perform the requested review. Furthermore, this project clearly falls within the City Charter mandate for the Inspector General to conduct internal and operational audits.

Scope of Review

Outlined below are the component parts of our review:

1. *Review of current operations:* This entails meeting with the department heads to learn their agency's operating procedures.
2. *Review of sample procurements:* There are three basic procurements that each department engages in: 1) contracts requiring sealed, competitive bidding; 2) procurements that do not require sealed bidding; and 3) professional service contracts. We will review a sample of each kind of contract to determine whether they are being awarded consistently with applicable laws and procedures. We will also review whether the contracts are being properly administered.
3. *Comparison of the two departments:* We will review the differences between the two departments and determine whether they are substantive. If there are significant differences, we will analyze which procedures are the most productive.
4. *Analysis of consolidation:* After we review and compare the two departments, we will analyze whether it makes sense to consolidate them. If our analysis leads us to believe that consolidation is warranted, we will provide an outline of how we believe the consolidation can best be accomplished. Our analysis should include a discussion of the legal and labor issues that would be presented by such a consolidation. It is envisioned that a formal

¹The Inspector General's Office has completed six comprehensive reviews of School matters which have either centered on or involved the District's procurement function including: 1999 review of Calculator and Computer Center, Inc.; 2000 review of Xerox Corp. contract; 2001 review of Apple Computer purchases; 2003 review of Division of Food Services; 2003 review of Fixed Assets Inventory; and 2005 review of administrative matters. Copies of these reports are available at cityofyonkers.com/inspector.

consolidation would require the approval of an inter-municipal agreement by both the City Council and the Board of Trustees.

If you have any questions regarding this review, please do not hesitate to contact me. I would be glad to speak to the Trustees directly about this matter.

PHILIP A. AMICONE
MAYOR



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DEPARTMENT OF
INSPECTOR GENERAL
CITY OF YONKERS

TO: Bernadette Dunne, President of the Yonkers Board of Education
All Board of Education Trustees

CC: Bernard Pierorazio, Superintendent of Schools

FROM: Philip A. Zisman, Inspector General *PAZ*

SUBJECT: June 29, 2007 Internal Audit – Risk Assessment Analysis

DATE: January 4, 2008

The Inspector General's Office has reviewed the D'Arcangelo & Co., Risk Assessment Analysis ("D'Arcangelo Report") dated June 29, 2007. This memorandum outlines specific areas for Inspector General review based on the recommendations in the D'Arcangelo Report.

The D'Arcangelo Report

In accordance with State legislation requiring that School Districts undergo an assessment of its business and financial risks, the School District hired the accounting firm of D'Arcangelo & Co., LLP to conduct the analysis. In a comprehensive 48 page report, D'Arcangelo identifies areas of risk to the School District, and provides a plan for the District to manage the risks that were found. The Report covers 15 different "business units" within the School District.¹ It does not cover pedagogical matters.

D'Arcangelo created a "Risk Register" which characterizes risks as severe, high, moderate or low, and proposed a four year timeline for conducting audits of the areas that are at risk. The bulk of the report is a summary of the specific risks that were deemed to be the highest priority. In the specific

¹ The categories are: General Control Environment, Information Technology, Budget, Financial Reporting, Payroll/Human Resources, Purchasing/Accounts Payable, State Aid, Attendance, Capital Projects, Special Aid Programs, School Lunch, Fixed Assets, Transportation, Cash Receipts/Billing and Extra Classroom.

summaries, D'Arcangelo recommends actions the District should take to address the risk.

Role of the Inspector General in the School District

The Yonkers Inspector General was appointed Inspector General of the School District on July 12, 2000. (Copy of Resolution attached.) The IG has broad discretion to conduct any investigation or audit which is deemed appropriate. A primary focus of the IG is to provide "proper ongoing review of monetary commitments, expenditures and internal procedures" in order to ensure that there are adequate internal controls in place that provide for the integrity of operations.

The D'Arcangelo Report calls for the School District to adopt a management plan that will minimize the risks to District operations. In essence the Report calls for a series of ongoing audits and reviews that will help ensure the integrity of District operations. The audits that the Report recommends are very much in keeping with the work of the IG's Office.

We have reviewed the D'Arcangelo Report with a focus on the "high" risks that D'Arcangelo recommends should be reviewed in the first year of a four year plan. We believe that for 2008, there are two specific projects (outlined below) that are appropriate for IG review.

Purchasing

The D'Arcangelo Report found significant risks with the District's accounts payable and purchasing procedures, including risks of duplicate requisitions and payments being made for the same purchases, and other inefficiencies in the purchase order process. In addition, the Report states that there are a lack of formal guidelines for purchases between \$3,000 and \$9,999.

In 2007, the Inspector General's Office conducted a review of the City's Purchasing Department. (A copy of our report on the City's Purchasing Department is available on the Inspector General's webpage on the City's website.) We recommend that a similar review of the District's purchasing office be conducted to ensure the integrity of the District's procurements and to analyze whether there are opportunities for cost savings and improved productivity.

Fringe Benefits

The District pays over \$100 million each year in employee benefits, which includes approximately \$55 million for health insurance. The D'Arcangelo Report questions certain policies and procedures with regard to these benefits, and found that the District may be at risk for payments to ineligible employees and their family members.

In 2004, the IG's Office conducted a review of the City's fringe benefits and found a number of opportunities for cost savings. A review of the District's

fringe benefit accounts would determine whether there are adequate internal controls in the benefits programs, verify coverage for eligible employees, and possibly identify other areas for cost savings. (A copy of the employee benefits report is also available on the Inspector General webpage.)

Other Areas Appropriate for Review

We initially recommend a review of purchasing and fringe benefits because of the significant expenditures made in these areas. In addition, other areas which would be appropriate for later review include overtime, employee reimbursements, and recordkeeping for use of vacation, sick and personal time.

Finally, the report also recommends ethics and fraud training and the creation of a whistleblower hotline. The Inspector General's Office is prepared to assist in implementing these programs.

I would like to schedule a meeting with the Board to discuss these matters at your earliest convenience.



YONKERS PUBLIC SCHOOLS

Exhibit 5

Achieving Excellence Together

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FEB 11 2008

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Yonkers, New York 10701
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Fax 914 376-8660

Trustees of the
Board of Education

DEPARTMENT OF
INSPECTOR GENERAL

MEMORANDUM

TO: Philip A. Zisman, Inspector General
FROM: Bernadette Dunne, President of the Yonkers Board of Education
DATE: February 7, 2008
RE: June 29, 2007 Internal Audit – Risk Assessment Analysis

Dear Phil,

Thank you for your letter of January 4, 2008. The Board members and I have discussed this. As we have previously stated to you, we feel that your services are not required at this time. We have our Internal Auditor, Claims Auditor, External Auditor, a new Director of Finance, and very soon, a new Chief Financial Officer, who will be working actively on our risk assessment and procedures. I thank you very much for your concern, and we can discuss this in the future.

Mrs. Bernadette Dunne, President
and Members of the Board of Education

BD:jwm

Bernadette Dunne, President
Debra Martinez, Vice President
Trevor H. Bennett

Michael E. Carey
John F. M. Flynn
Richard Greco, Jr.

Lisa C. Perito
Rev. Gerald Sudick
Marlin K. Wiggins

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**DEPARTMENT OF
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CITY OF YONKERS**

TO: Bernadette Dunne, President of the Yonkers Board of Education
All Board of Education Trustees

FROM: Philip A. Zisman, Inspector General

SUBJECT: Scheduling a Meeting to Report to the Board

DATE: February 21, 2008

Board Member Resolution 00-7-1, designating the Inspector General for the City of Yonkers as the Inspector General for the Yonkers Public Schools requires that the Inspector General "shall report on a regular basis to the Board of Trustees at its regularly scheduled meetings or Special Meetings, publicly noticed by the Board of Education, on all ongoing Inspector General matters that concern the Board of Education."

In accordance with this provision, I would like to schedule a meeting with the Board. Topics to be discussed include the Center for Continuing Education, and the Inspector General's review of the June 29, 2007 Risk Assessment Analysis.

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**DEPARTMENT OF
INSPECTOR GENERAL
CITY OF YONKERS**

TO: Rev. Gerald Sudick, President of the Yonkers Board of Education
All Board of Education Trustees
Bernard Pierorazio, Superintendent

FROM: Philip A. Zisman, Inspector General

SUBJECT: Review of Health Insurance Payments

DATE: December 1, 2008

The Inspector General's Office will conduct a review of the School District's payments for employees' health insurance benefits and to the unions' trust and welfare funds. In evaluating these payments, questions we will answer include:

- Are the invoices that the medical insurance providers submit to the District accurate and consistent with all contractual obligations?
- Does the District review all submitted bills for accuracy?
- Do the District's records accurately reflect the coverage status of employees and retirees who are entitled to insurance?
- Is the District being correctly charged for single or family coverage plans?
- Do the insurance bills accurately reflect employees who are added and deleted from coverage?
- Does the District correctly contribute to the municipal unions' trust and welfare funds?
- Are the trust and welfare funds being spent in accordance with the union contracts?
- Are required employee health insurance contributions being correctly deducted from employees' paychecks?

I will schedule a meeting with the Superintendent's Office to discuss this review in more detail. I am also available to brief the Board.

If you have any questions, please do not hesitate to contact me.

BOARD MEMBER RESOLUTION
 09-1-257C
Yonkers, New York
 January 21, 2009

**RE: Utilization of the Inspector General for
 The Yonkers Public Schools**

Ladies and Gentlemen:

WHEREAS the Board of Education wishes to revise the prior Resolution 00-7-1 to re-authorize the Inspector General of the City of Yonkers to provide services to the Board on an invitational basis.

NOW THEREFORE BE IT RESOLVED: that the Inspector General for the City of Yonkers shall be utilized as the Inspector General for the City of Yonkers Public Schools when invited by a majority vote of the Board of Trustees or at the invitation of the Superintendent of Schools upon notification to the Board of Trustees,

BE IT FURTHER RESOLVED: that when the Board of Education and the Superintendent of Schools utilize the Inspector General they shall make every reasonable effort to ensure the full cooperation of all persons employed or supervised by them with the work and requests of the Inspector General, and

BE IT FURTHER RESOLVED: that when the Board of Education and the Superintendent of Schools utilize the Inspector General they shall make available to the Inspector General such facilities, services, personnel and other assistance deemed reasonable and appropriate by the Board of Education for the conduct of his work, and

BE IT FURTHER RESOLVED: that when the Board of Education and the Superintendent of Schools utilize the Inspector General they shall provide to the Inspector General, upon request, any and all documents, records, reports, files or other information, except such documents as cannot be so disclosed according to law, and

BE IT FURTHER RESOLVED: that this resolution shall immediately replace Resolution 00-7-1.

RESOLUTION SPONSORED BY:

 Rev. Gerald Sudick, President

 Trevor H. Bennett, Trustee

 Bernadette Durme, Trustee

 Debra Martinez, Trustee

 Parsh Patel, Trustee

 Nydia D. Perez, Trustee

 Lisa C. Perito, Trustee

**PHILIP A. AMICONE
MAYOR**



**CITY HALL
YONKERS, NEW YORK 10701-3883**

**PHILIP A. ZISMAN
INSPECTOR GENERAL**

**Ph: 914-377-7000
Fax: 914-377-6990**

**DEPARTMENT OF
INSPECTOR GENERAL
CITY OF YONKERS**

TO: Rev. Gerald Sudick, President of the Yonkers Board of Education
All Board of Education Trustees
Bernard Pierorazio, Superintendent

FROM: Philip A. Zisman, Inspector General *PAZ*

CC: Philip A. Amicone, Mayor
Chuck Lesnick, City Council President
All City Council Members

SUBJECT: Resolution No. 09-1-257c

DATE: April 9, 2009

I write in response to the January 21, 2009 adoption of Board Resolution No. 09-1-257c, which attempts to eliminate the Inspector General's ("IG") independent authority to conduct investigations and audits at the School District by requiring that all IG work be by invitation of the Board of Trustees or the Superintendent. (Copy attached as Exhibit "1")

This resolution – which appears to have been adopted in reaction to the announcement that the IG's Office will audit the District's health insurance payments – was procedurally defective and in conflict with the IG's statutory authority as set forth in the City Charter. The restrictive policy also imprudently attempts to undermine the important role of the IG in reviewing the District's administrative operations.

My office intends to go forward with the scheduled health insurance payment audit notwithstanding Resolution No. 09-1-257c. I am, however, available to meet with the Trustees to discuss this matter.

This memorandum provides: 1) background information regarding the IG's decision to audit the District's health insurance payments that appears to have

triggered the Board's adoption of the Resolution; 2) a legal analysis of why the adoption of the resolution was procedurally and substantively defective; and 3) a discussion of the significance of the independent oversight that the IG has provided to the School District.

It Appears that Resolution No. 09-1-257c was Adopted in Response to the IG's Decision to Audit the District's Health Insurance Payments

Resolution 09-1-257c was adopted seven weeks after I notified the Board that the Inspector General's Office was going to conduct an audit of the School District's health insurance payments. Although the Board has never given a reason for this change in policy, based on the facts set forth below, it appears that the Board acted in response to the announced IG payment audit.

As Inspector General, I have long believed that a review of the District's health benefits payments – which now exceed \$65 million annually – is appropriate.¹ The need for such a review is consistent with the findings of the District's consultant D'Archangelo & Co., which in a June 29, 2007 Risk Assessment Analysis, found that the District may be at risk for health payments made on behalf of ineligible employees and their family members. The 2006 KPMG audit report of School District operations also expressed concerns about the accuracy of these payments.

Before scheduling a review of these payments, I sought input from Superintendent Pierorazio and the Board of Trustees. In a memorandum dated January 4, 2008, I requested a meeting with the Board to discuss this audit and other matters. However, by memorandum dated February 7, 2008, the Board stated that the services of the Inspector General were not required because the District would be working with its internal audit team to address its risk assessment and procedures. (Copies of the January 4 and February 7, 2008 memoranda are attached as Exhibits "2" and "3")

Thereafter, I continued to have periodic discussions with Mr. Pierorazio on the need for a health benefits payment review. I also met with a representative of the D'Archangelo firm and Mr. Pierorazio on the matter. I remained convinced that, notwithstanding the Board's opposition, the proposed review was still warranted, and determined that the IG's Office would go forward with the audit. As a result, on December 1, 2008, I sent a memorandum to the Board of Trustees and Superintendent Pierorazio stating that we were going to conduct a review of the School District's payments for employees' health insurance benefits and the unions' trust and welfare funds. (A copy of this memorandum is attached as exhibit "4".) In that memorandum, I offered to brief the Board and answer any questions.

On December 15, 2008, I met with Mr. Pierorazio to discuss the details of the audit, and he indicated to me that the Board had reservations about this

¹ We conducted such a review of the City's health insurance payments in 2004.

project. I repeated my offer to meet with the Board to explain the work we would be conducting.

The Board of Trustees never responded to the December 1, 2008 memorandum or my other offer through Mr. Pierorazio to meet with them. Instead, on January 21, 2009 the Board adopted Resolution No. 09-1-257c. The resolution, which was passed without explanation, seeks to make the work of the Inspector General at the School District by invitation only, and thus attempts to prevent the IG's Office from conducting the proposed audit of health insurance payments.² Although the resolution has caused delays, we still intend to perform this work.

The Adoption of Resolution 09-1-257c was Defective

Resolution 09-1-257c purports to amend Board Resolution 00-7-01, the provision that initially appointed the Inspector General for the City of Yonkers the Inspector General for the School District. The adoption of 09-1-257c was both procedurally and substantively defective. The Board failed to follow its own stated policies and procedures for adopting new policies, and the resolution also conflicts with the Yonkers City Charter, which gives the IG independent authority to audit City funded agencies.

Resolution 09-1-257c was voted on by the Board of Trustees at its January 21, 2009 meeting. The Resolution, however, did not appear in the originally published Agenda for that meeting, and when adopted it was only referred to by number and voted on along with a group of other resolutions. There was no discussion and no supporting documentation setting forth the reasons for this change in policy. (See video and Agenda of the January 21, 2009 Board Meeting) There was also no notice to or input from the Inspector General's Office, the public, or community groups. In essence this was a stealth resolution which has yet to be explained. Furthermore, the manner in which it was adopted violated Board policy.

First, the adoption of the resolution violated Board of Education Policy §2342 – AGENDA PREPARATION AND DISSEMINATION that requires “new items for discussion” to be included on the Agenda. The Agenda is to be submitted on Friday immediately preceding the Board meeting. Resolution No. 09-1-257c was never properly placed on the Agenda before its adoption.

Second, the adoption of the Resolution violated Board Policy §2410 – FORMULATION, ADOPTION, AMENDMENT AND SUSPENSION OF POLICIES. This provision provides:

Policy adoption is the function of the Board. Policy development

² The actual work on the project had been scheduled to begin on January 15, 2009. We had scheduled a meeting with Mr. Pierorazio and the District's human resource employee who was responsible for overseeing the health insurance payments. This meeting was cancelled by the Superintendent's Office.

is a cooperative process involving Board, administration, employees, employee organizations and members of the community. A policy is a guide for discretionary action. It expresses the intent of the Board concerning the job it expects of those to whom it gives authority. Policy statements guide the Board in making decisions and indicate certain practices the administration will follow. (Underlining added)

The Board's stealth adoption of Resolution 09-1-257c violated the policy that requires a cooperative process with involvement of the stakeholders who have an interest in the policy. At a minimum, the Board should have placed the resolution in the Agenda and notified interested parties so they could have commented on the proposed change.

Finally, in addition to the procedural defects, the Resolution conflicts with the IG's statutory authority set forth in the City Charter. Section C7-2-D provides that "[t]he jurisdiction of the Inspector General shall extend to any agency, officer or employee of the city, or any person or entity doing business with the city, or any person or entity who is paid or receives money from or through the city or any agency of the city." The City's annual contribution to the School District's budget establishes the right of the Inspector General to audit and review the operational expenses of the District irrespective of the Board of Trustees' efforts to limit that jurisdiction. As a result, the substance of the Resolution is unenforceable with respect to District expenditures that are funded through Yonkers tax dollars.

The Important Role of an Independent IG at the School District

The short-sightedness of Resolution No. 09-1-257c is underscored by the past effectiveness of the IG's reviews and audits of the School District's administrative operations. Beginning in 1998, the IG's Office has conducted a broad range of independent investigations and reviews at the District. We have engaged in investigations of matters involving alleged conflicts of interest, payroll fraud, contract mismanagement, procurement fraud, standardized test tampering, program mismanagement and employee misconduct. We have audited District contracts, reviewed a number of personal policies and procedures and conducted performance reviews of District operations. We also have an ongoing program of conducting vendor background reviews to confirm the responsibility of low bidders for District contracts valued at more than \$100,000.

We try to work cooperatively with the School District's administration and many of our past projects were requested by the Superintendent's Office. However, we have also performed work based on our own independent authority.

Based on the IG's own initiative, we conducted the 2005 review of the District's hiring of Pietro Barberi as a Senior Accountant, which led to the indictment of the Superintendent and the Director of Finance. Before announcing the investigation, I talked to several Trustees and urged them to authorize the review, but they declined to take action. Similarly, although individual City Council members called for the investigation, the Council as a whole did not

direct the IG to conduct such an investigation. If Resolution No. 09-1-257c had been in full effect, it was likely that the investigation would never have been performed and the facts and circumstances surrounding the Superintendent's improper appointment of Mr. Barberi would never have been known.

The Barberi matter was not the only incident of this kind. After Andre Hornsby was dismissed as superintendent, we received credible allegations that he had engaged in improper procurement practices with respect to the District's copier contract with Xerox Corp. Again, the Trustees as a whole did not support a review by the Inspector General. We nonetheless conducted the investigation. We also independently reviewed the District's purchase of Apple computers under Dr. Hornsby.

Other examples of our independent work in the School District include our 2003 performance audit of the District's food services division; our 2005 investigation into allegations of employee misconduct; and more recently, our 2008, review of allegations of theft at the now defunct Center for Continuing Education, and our audit of the District's contract with the alarm services provider, Sonitrol, Inc.

As Inspector General, I have regularly made independent decisions to conduct audits and investigations in the School District, and the ability to do so is a central component of our role as the District's IG. The findings of our independent reports have led to important reforms at the School District. In addition to its procedural defects, the Boards' adoption of Resolution 09-1-257c, unwisely attempts to limit the effectiveness of the IG's independent role at the District, and, if implemented, would adversely affect efforts to ensure transparency and accountability within the School District's administration.



YONKERS PUBLIC SCHOOLS

Achieving Excellence Together

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**Trustees of the
Board of Education**

April 28, 2009

Philip A. Zisman, Inspector General
City Hall
40 South Broadway
Yonkers, New York 10701

Dear Mr. Zisman:

I have received your memorandum dated April 9, 2009, in which you raise objections to the Board's resolution No. 09-1-257C regarding your role at the Board of Education. In your letter you take the position that notwithstanding the Board's decision, you have independent authority under the city charter of the City of Yonkers to "review . . . the District's administrative operations." Please be advised that the Board of Education is not a department of the City of Yonkers and is not subject to the City Charter of the City of Yonkers, but is an independent municipal corporation governed exclusively by the New York State Education Law.

In this regard, please see the case of People ex rel Elkind v Rosenblum, 184 Misc 916 (Sup. Ct. Westchester), aff'd 269 A.D. 946 (2d Dept 1945), aff'd 295 N.Y. 929 (1946). (Copy annexed). In that case, the city council of the City of Yonkers amended the City Charter to require the "advice and consent" of the council for appointment of members of the Yonkers Board of Education. The court annulled the provision, finding that neither the Constitution nor the City Home Rule Law gave the city any express or implied power to legislate with respect to matters affecting the public school system or board of education.

Rev. Gerald Sudick, President
Marlin K. Wiggins, Vice President:
Trevor H. Bennett

Michael E. Carey
Bernadette Dunne
Debra Martinez

Paresh Patel
Nydia D. Perez
Lisa C. Perito

The court held that

The Legislature, by general law, has provided for a complete system of public education, and imposed upon boards of education, as corporate bodies, separate and apart from the municipalities in which they exist, the responsibility of maintaining and administering its public school system. (People ex rel Wells & Newtown Co. v. Craig, 232NY125; Matter of Divisich v Marshall, 281 NY 170.

Elkind, supra at 919 (citations in original).

Moreover, the Constitution expressly excluded from the power granted to cities to adopt local laws, whether adopted by local legislation, or by popular vote, any enactment which might apply to or affect the administration of the public school systems in such cities.

Id. At 921.

In closing, please be assured that while the Board of Education and the Superintendent are appreciative of your cooperation and concerns, we are also aware of the Constitutional and statutory structure and mandates governing education in the State of New York, and our responsibility under that structure.

Sincerely,



Rev. Gerald Sudick, President
and the Trustees of the Yonkers
Board of Education

/jes
Enclosure

184 Misc. 916, 54 N.Y.S.2d 295

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THE PEOPLE OF THE STATE OF NEW YORK EX REL. ABRAHAM H. ELKIND et al., Plaintiffs,
v.

ABRAHAM ROSENBLUM et al., Defendants.
Supreme Court, Special Term, Westchester County.
February 21, 1945.

CITE TITLE AS: People ex rel. Elkind v Rosenblum

Schools

Board of education --- Appointment of members under State or local law --- (1) Education Law (§ 866, subd. 5, as added in 1917) providing that members of board of education in certain class of cities which includes Yonkers shall be appointed by 'mayor', and not 1938 local law providing for appointment by mayor 'with consent of the common council' governs --- (2) City's right to supersede Education Law by local law must be derived from express grant --- (3) Home Rule Amendment of 1923, Constitution of 1938 and City Home Rule Law in giving cities general power to adopt local laws, not inconsistent with law, relating to selection of city officers provided that nothing therein should affect 'administration' of public school systems in cities --- (4) Thus neither Constitution nor law gave cities any express grant to legislate as to boards of education --- (5) Nor may grant be implied from powers with respect to city officers; members of boards of education in cities not city officers --- (6) More explicit language would have been employed if framers of Constitution and legislators had intended to include such members in general power in Constitution and statute --- (7) Local law not saved by adoption by popular vote --- (8) Local law affects 'administration' --- (9) Contention that local law not inconsistent with section 866 because council now vested with executive power exercised by mayor in 1917 when section 866 enacted, not sustained --- (10) Defendants' appointment as members by mayor in 1943 pursuant to section 866 valid and when plaintiffs appointed as such by new mayor in 1944 no vacancies existed in office

1. Subdivision 5 of section 866 of the State Education Law (as added by L. 1917, ch. 786, § 1) which provides that the members of a board of education in a class of cities which includes the city of Yonkers shall be appointed 'by the mayor', and not a local law adopted in 1938 by the voters of said city, amending the city charter and providing that such members 'shall be appointed by the mayor with the advice and consent of the common council', governs their appointment.

2. Since the Legislature has provided in the Education Law for a complete system of public education and imposed on the boards of education as corporate bodies the responsibility of administering the public school system, the authority of a city to supersede such provision of the Education Law by a local law must come from an express grant of power and not from a general or implied grant.

3. The Home Rule Amendment of 1923 (N. Y. Const. of 1894, art. XII) and the City Home Rule Law adopted in 1924 pursuant thereto (both of which were in effect at the time the local law in question was adopted in 1938) and the Constitution of 1938 and the City Home Rule Law as amended in 1939, (both of which were in effect when the appointment of defendants was made) in giving cities power to adopt local laws, not inconsistent with the Constitution and laws of the State, relating to the mode of selection of all officers and employees of city (Const. of 1894, art. XII, § 3 [now art. IX, § 12]; City Home Rule Law, § 11 [now § 21]) respectively provided, however, that nothing in the Constitution or in the law should apply to or affect the maintenance or 'administration' of the public school systems in the cities of the State (Const. of 1894, art. XII, § 7 [now art. IX, § 13, subd. B]; City Home Rule Law, § 21).

4. Accordingly, neither the Constitution nor the City Home Rule Law gave the cities any express power to legislate with respect to matters affecting the public school systems or boards of education.

5. Nor may such a grant of power be implied from the general power given in the Constitution and in the City Home Rule Law with respect to the selection of city officers. Members of boards of education in cities are not city officers (Education Law, § 300).

6. If the framers of the Constitution and the legislators had intended to include members of boards of education

in the provisions of the Constitution and the statute relating to the mode of the selection of city officers, more explicit language would have been employed by them.

7. Notwithstanding that the restrictions imposed on city legislation by section 21 of the City Home Rule Law are only to action by the local legislative bodies of cities, the City of Yonkers had, under the constitutional provisions, right to adopt by vote of its electors a local law in respect to 'administration' of the public school system in its city

8. The local law here concerned was of the class expressly excluded from the scope of the city's legislative power. The act of appointment to a board of education affects the 'administration' of the duties and functions of the office since without such appointment the office cannot be administered.

9. The contention that the local law under attack, requiring the advice and consent of the council, is not inconsistent with section 866, permitting appointment by the mayor alone, because the council has since retained itself the powers that were exercised by the mayor when section 866 was enacted in 1917, is not sustained. The charter as amended indicates, to the contrary, that the council has such powers 'except as in this amendment otherwise provided' and under the other provisions thereof the city manager, not the council, becomes the chief executive with the powers formerly possessed by the mayor. The city manager form of government was well known to the Legislature in 1917 when it omitted any requirement for action by the council.

10. Accordingly, the appointment pursuant to the State Education Law, of defendants as members of the Board of Education in 1943 by the mayor alone was valid. When plaintiffs were appointed as members by a new mayor in 1944 no vacancies existed in the offices to which they were appointed. Therefore, on the pleadings in this action in the nature of *quo warranto* the title to office of defendants is sustained.

ACTION in nature of *quo warranto*.

Nathaniel L. Goldstein, Attorney-General (Theodore Kiendl of counsel), for plaintiffs.
Morris L. Rosenwasser for Abraham Rosenblum, defendant.
***918**

William J. Wallin for William Crocker, defendant.
John J. Broderick, Corporation Counsel, for City of Yonkers, amicus curiæ.
Charles A. Brind, Jr., for Board of Regents of University of State of New York, amicus curiæ.

NOLAN, J.

In 1917, the Legislature of the State of New York added to the State Education Law, section 866 (L. 1917, ch. 786, § 1), which provides, with respect to the selection of members of the Board of Education in the class of cities which includes the City of Yonkers, that '* * * members of the board of education shall be appointed * * * by the mayor * * * but in a city having a population of four hundred thousand or more and less than one million, such appointment shall be subject to confirmation by the council.' (Education Law, § 866, subd. 5.)

In 1938, by local law,^{FNa1} adopted by the vote of the electors of the city, pursuant to the provisions of section 19-a, of the City Home Rule Law, the Charter of the City of Yonkers was amended. The amended charter provides (art. XVII), with respect to the selection of members of the Board of Education that, 'The members of such Board shall be appointed by the mayor with the advice and consent of the common council.'

a1. Not published in Local Laws of Cities in State, pursuant to section 22 of City Home Rule Law, although adopted as such local law. -- [REP.]

In 1943, the Mayor of the City of Yonkers, then in office, reappointed the defendants, who were then serving in that capacity, and whose terms were about to expire, members of the board of education. The Common Council neither advised such appointments nor consented to them. Since Yonkers was a city having a population of less than four hundred thousand, no such advice or consent was necessary, if the provisions of the Education Law alone governed such appointments. However, if the provisions of the amended charter, which limit the power of the mayor to appoint, by providing that the advice and consent of the council must be obtained, are valid, the appointments of defendants were void, and of no effect.

Apparently believing that such appointments were void and that vacancies consequently existed, the present mayor has appointed the plaintiffs-relators to the board of education, to succeed the defendants, whose terms were stated, in such latter appointment, to have expired in 1943.

The latter appointees have now brought this action, to determine the title to the offices in question. The facts are not *919

in dispute. The sole question to be decided is one of law, and as counsel have suggested, may be stated thus: does the State Education Law, or the Yonkers Local Law govern the appointment of members of the board of education?

If the local law governs, plaintiffs are entitled to relief. If the State law governs, defendants were properly appointed and the complaint must be dismissed.

The authority of the Legislature to enact section 866 of the Education Law is not questioned. The question presented concerns the authority of the city to restrict, by local law, the power of appointment vested in the mayor by the State Education Law.

If such power existed, it must be found in the State Constitution, or in State legislation enacted pursuant thereto. The city, which is a municipal corporation, is a creature of the law. The law defines its powers and duties. It has no more right to act in excess of the powers granted to it than has a private corporation. (*Brooklyn City Railroad Co. v. Whalen*, 191 App. Div. 737.) Public education is essentially a State and not a city function. (*Gunnison v. Bd. of Education*; 176 N. Y. 11.) The Legislature, by general law, has provided for a complete system of public education, and imposed upon boards of education, as corporate bodies, separate and apart from the municipalities in which they exist, the responsibility of maintaining and administering its public school system. (*People ex rel. Wells & Newton Co. v. Craig*, 232 N. Y. 125; *Matter of Fuhrmann v. Graves*, 235 N. Y. 77; *Matter of Divisich v. Marshall*, 28 N. Y. 170.) The same general law provides the powers and duties of such boards (Education Law, § 868), and for their qualifications, terms of office, and methods of selection of the members thereof (Education Law, § 866). Since the Legislature has so provided, the authority of a city to supersede such provision by local law, or ordinance, must come from an express grant of power, and will not be inferred from general grants, or held to exist as an implied, or incidental right. A State policy may not be ignored by a municipality, unless it is specifically empowered to do so in terms clear and explicit. (*People ex rel. Kielay v. Lent*, 166 App. Div. 550, affd. 215 N. Y. 626; *Jewish Consumptive Relief Soc. v. Town of Woodbury*, 230 App. Div. 228, affd. 256 N. Y. 619; *People v. County of Westchester*, 282 N. Y. 224.) Neither the Constitution of 1894 (as in effect when the amended charter was adopted), nor any State statute, gave to the City of Yonkers in express terms, any power to enact the provisions of the amended charter, under attack in *920

this action. The Constitution of 1894 provided, by section 3 of article XII (added in 1923; now Const. of 1938, art. IX, § 12), that cities should have power to adopt and amend local laws, not inconsistent with the Constitution and laws of the State, relating to the powers, duties, qualifications, number, mode of selection, etc., of all officers and employees of the city, and relating to other enumerated subjects, and directed the Legislature to provide by general law for carrying into effect the constitutional grant of power. That article of the Constitution provided, however, by section 7 (now art. IX, § 13, subd. B), that 'Nothing in this article contained shall apply to or affect the maintenance, support or administration of the public school systems in the several cities of the state * * *.' The City Home Rule Law, adopted in 1924 (L. 1924, ch. 363), pursuant to the constitutional direction, provided, by section 11, for the power of the cities of the State to adopt local laws. The same general grant of power with respect to the mode of selection of city officers and employees, was included in that section of the statute, but again in section 21 of the same law, the local legislative body of a city was prohibited from adopting a local law, which superseded a State statute, if such local law applied to, or affected the maintenance, support or administration of the educational system in such city. In the Constitution of 1938, adopted by the Constitutional Convention, and approved at the general election of that year, which became effective January 1, 1939, the City Home Rule provisions of the former constitution were generally revised, and certain new provisions were added. Thereafter, in 1939, the City Home Rule Law was amended in its entirety. Again, in both the Constitution and the City Home Rule Law, the cities of the State were granted power to enact local laws with respect to enumerated subjects, including the mode of selection of their officers and employees. The Constitution (art. IX, § 13, subd. B) again provided that nothing contained in the article which contained the city home rule provisions should 'apply to or affect or be deemed to restrict the power of the legislature in relation to (a) the maintenance, support or administration of the public school systems in any city', and a like prohibition against the adoption of local laws by local legislative bodies was included in section 21 of the City Home Rule Law. Neither the Constitution, nor the statute gave the cities of the State any express power to legislate with respect to matters affecting the public school systems, or boards of education. Such grant of power should not be implied from *921

the general power given with respect to the selection of city officers. Members of boards of education in cities perform functions which are generally regarded as connected with city government. They are, however, officers of corporations created by the State, separate from the cities in which they exist, for the purpose of enforcing a State

function, and are not city officers. (Education Law, § 300; *People ex rel. Wells & Newton Co. v. Craig*, 232 N. Y. 125, *supra*; *Lewis v. Bd. of Education of City of New York*, 258 N. Y. 117.) In view of the fixed policy of the State, regard public education as a State, and not a local function, it would seem that if the Legislature, or the framers of the Constitution had intended to include members of boards of education in the provisions of the Constitution and statute, relating to the mode of selection of city officers, clearer and more explicit language would have been employed.

It is true that the restrictions imposed on city legislation by section 21 of the City Home Rule Law, apply only to action by the local legislative bodies of cities. The city had no right, however, to adopt local laws by the vote of its electors, any more than it had to adopt such laws by action of its legislative body, if authority for such legislation had not been granted, by the Constitution, or by statute. Moreover, the Constitution expressly excluded from the power granted to cities to adopt local laws, whether adopted by local legislation, or by popular vote, any enactments which might apply to or affect the administration of the public school systems in such cities. Administration is generally understood to mean management, direction or supervision. It may be conceded that one who appoints a public officer does not join in the administration of the public office, by the act of appointment alone. The act of appointment, however, is one which has application to, and affects the administration of the duties or functions of such office, since without an appointment, the office cannot be administered.

The contention of the plaintiffs that the charter provision under attack is not inconsistent with section 866 of the Education Law, may not be sustained. It is true that in 1917, when section 866 of the Education Law was adopted, municipal government in general, and particularly in Yonkers, was carried on by a mayor, who was the chief executive of the city, and by a council, vested with legislative powers, and that under the present form of government, the mayor of the City of Yonkers is no longer its chief executive, and does not exercise the powers formerly vested in the elected mayor. The council, however, has not, as plaintiffs contend, retained to itself, the powers *922

formerly exercised by the mayor. The amended charter provides that the council shall have such powers 'except as in this amendment otherwise provided'. The charter, as amended in 1938, directed the appointment of a city manager, who should be the chief executive, and administrative officer of the city, and vested in him many of the powers formerly exercised by the mayor. The Education Law may not be construed, however, in referring to the mayor, as the person who shall appoint, as meaning that the power of appointment shall be vested in the mayor, if the chief executive of a city, and in the council, if executive powers are vested in, or retained by that body. In 1917 neither the city manager form of government of cities, nor government by a council exercising executive power, was unknown to the Legislature. At the time of the adoption of section 866 of the Education Law, the Legislature had theretofore adopted the Optional City Government Law, which was then in effect. That statute provided for several plans of city government, among which were plans A, B and C. The first two plans provided for the vesting of legislative, administrative and executive powers in a council, and the third for legislative powers to be exercised by council, and administrative and executive powers in a city manager. Under all such plans, the powers of the mayor were limited, and under plan C, his powers and duties were quite similar to those assigned to the mayor under the present form of government of the City of Yonkers. The Legislature, nevertheless, provided in the Education Law, for the appointment of members of boards of education, in Yonkers, and cities included in the same population classification, by the mayor, without the ratification or consent of the council. The court may not assume that in so doing, the Legislature acted in ignorance of the provisions which it had theretofore made, for forms of city government, other than that in effect in the City of Yonkers in 1917.'

The court may not decide, and expresses no opinion, as to which method of appointment is preferable, or best calculated to assure an efficient and nonpolitical administration of the school system. That question is for the Legislature, and not for the court to decide, and is one which may not be decided by the city, either through its council, or by vote of its electors, until legislative sanction for such action shall have been obtained.

It is the court's opinion, therefore, that the appointment of the defendants in 1943, was a valid exercise of the appointive power vested in the mayor of the City of Yonkers, pursuant to *923

the provisions of the State Education Law, and that when plaintiffs were appointed, in 1944, no vacancies existed in the offices to which they were appointed. On the pleadings, defendants' title to office has been sustained. The motion of the defendant Crocker to dismiss the complaint is granted. Plaintiffs' motion to strike out the defense of the defendant Rosenblum, and for judgment on the pleadings is denied, and judgment is granted to defendant Rosenblum, pursuant to rule 112 of the Rules of Civil Practice, dismissing the complaint. Settle order accordingly, on notice.

THE PEOPLE OF THE STATE OF NEW YORK EX REL. ABRAHAM H. ELKIND et al., Plaintiffs, v. ABRAHAM ROSENBLUM
et al., Defendants.
184 Misc. 916, 54 N.Y.S.2d 295

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