since neither of the agencies involved is charged by Indiana law with "the responsibility of supporting and educating any child," nor could a contract authorizing the same be made.

OFFICIAL OPINION NO. 8

February 6, 1948.

Hon. Ralph F. Gates, Governor,
State of Indiana,
206 State House,
Indianapolis, Indiana.

Dear Governor Gates:

Your letter of January 16, 1948 has been received in which you request an official opinion as to whether or not the State Optometry Board has full authority under law to alone set the qualifications of the schools which they will consider competent for optometry training before allowing a person to take an examination before the Board. You further desire to know if it is necessary for any such rules and regulations concerning such matters to be approved by the Governor under the 1945 law regarding rules adopted by State agencies.

In your letter, you state complaints have been made by veteran's entitled to G. I. training, who desire to practice optometry, and cannot be admitted to a school which will be approved by the Indiana Optometry Board.

The law governing this question is contained in Sections 63-1001 et seq., Burns' 1943 Replacement, same being Chapter 187, Acts of 1907, as amended.

Section 63-1001, Burns' 1945 Supp. creates the Indiana State Board of Registration and Examination in Optometry and further provides in part that said Board shall have the following authority and duties:

"(b) Rules and Regulations. To make and promulgate rules and regulations, and to do any and all things not inconsistent with this act, which it may deem necessary or expedient for the effective enforcement of this act, and for the full and efficient performance of its duties hereunder, and the reasonable
regulation of the profession and practice thereof by persons licensed under this act.

“(c) Applications for Registration or License—Rules and Regulations—Records. To make such rules and regulations not inconsistent with the provisions of this act, governing applicants and applications for registration or license under this act, and governing the examination of applicants before beginning the practice of optometry in this state, and to establish a schedule of qualifications of applicants, and a schedule of the minimum requirements with which applicants for examination must comply before they can be examined or receive a certificate of registration, which schedules of qualifications of applicants and of minimum requirements shall be kept in a record for that purpose by said board.

“(d) Schools of Optometry—Records—Requirements—Rules. From time to time, to establish and record, in a record kept for that purpose, a schedule of the minimum requirements and rules for the recognition of schools of optometry, so as to keep the requirements of proficiency up to the average standard of other states.

“(i) Certificates of Registration—Grant—Revolcation. To grant or refuse to grant certificates of registration as hereinafter provided for, to revoke or suspend the certificate of registration as hereinafter provided for, of any optometrist, for any violation of this act or for a violation of any rule or regulation of said board.”

Thereafter said statute under Sections 63-1009 to 63-1011, Burns’ 1943 Supp. provides in detail the procedure to be followed by an applicant who is required to file a certificate issued by said Board with the Clerk of the County in which he intends to practice, at which time the Clerk issues to him a license in the form prescribed and set out in said sections of the statute.

In the case of Ritholz v. Indiana State Board of Registration and Examination in Optometry, et al. (1937), District Court N. D. Ind., Hammond Division (45 Fed. Supp. 423) the
validity and constitutionality of the foregoing statute was fully considered by a three judge panel of the Federal Court, being an action for injunction against the board's interfering with the plaintiff's company engaging in business in this State. The Court made a finding of fact, quoting each of the foregoing parts of the statute herein quoted, and on page 435 of the opinion, under its "Conclusions of Law," held:

"2. That subsections (a), (b), (c), (d), (e) and (i) of Section 1, and Section 11, of Chapter 38 of the Acts of the General Assembly of Indiana of 1935 are each constitutional and valid, and that said subsections and section are not, nor are any of them in conflict with either Section 1 of Article IV, Section 23 of Article I or Section 23 of Article IV of the Constitution of the State of Indiana."

The foregoing statute was before the Indiana Supreme Court for construction as to the constitutionality of certain other sections in the case of Bennett v. Indiana State Board of Registration and Examination in Optometry (1936), 211 Ind. 678. On page 690 of the opinion, the Court in conclusion said, "This court is unable to say that the Act, as a whole, is not a valid exercise of the police power of the State."

It is true that under the requirements of Chapter 120 of the Acts of 1945, all rules and regulations previously adopted under the provisions of any other statute expired on January 1, 1946, and thereafter only those rules and regulations adopted by state officers, boards and agencies, pursuant to the provisions of Chapter 120, Acts of 1945, were valid. However, the Indiana State Board of Examination and Registration in Optometry on December 28, 1945, adopted certain rules and regulations pursuant to the provisions of Chapter 120, Acts of 1945, which were approved by the Attorney General of Indiana as to legality, and approved by the Governor of Indiana and filed with the Secretary of State and the Legislative Reference Bureau on January 2, 1946, all pursuant to the requirements of said Chapter 120, Acts of 1945. The pertinent provisions of said rules are as follows:

"1. Educational requirements established by the Board which must be fulfilled before a candidate will be permitted to take the examination for license to
practice optometry in the State of Indiana are: Applicants must be twenty-one years of age; good moral character; graduate of a commissioned high school, having taken science course covering mathematics (specifically algebra), a foreign language for two years and a laboratory course in either physics, chemistry or biology with electives to give sixteen units, and

“A graduate of a College of Optometry under one of the following conditions:

“(a) An applicant for license who graduated prior to the adoption of these rules, or who was in attendance at, or matriculated in a College of Optometry, whose requirements for graduation were equivalent to those required by the Indiana State Board of Registration and Examination in Optometry at the time of matriculation.

“(b) For those applicants who begin study at the college level after January 1, 1946, the following character of study is required and acceptable: Two years pre-optometry or two years pre-medicine in a College of Arts and Science whose credits will be accepted by a University having a College or School of Optometry, followed by at least three years of Optometry in a College of Optometry connected with a University.

“For the purpose of this rule, the term ‘University’ shall mean an institution supported in whole or in part by public funds and termed a ‘University’ by the statutes of the state where the same may be located, or, an institution of higher learning which is composed of two or more Colleges constituting an aggregation for the purpose of higher learning.”

What has been said above substantially answers your inquiry. Nevertheless, since you have requested a full opinion covering the matter, I think it is advisable to give some consideration to subparagraph (b) above. It is noted that the three year requirement for the study of optometry is limited to a college of optometry “connected with a university.” Whatever may have been the purpose of that limitation to universities, I see no reasonable connection between that and the end desired, to wit: study in a properly constituted
school. It seems to me that such a limitation is an arbitrary exercise of the police power, and therefore unconstitutional. To a larger extent, the same question applies to the two years of pre-optometry or two years pre-medicine. In that case, the credits must be acceptable "by a university," which requirement is at least uncertain.

However, it is apparent that in sub-paragraph (b) of the Indiana State Board of Registration and Examination in Optometry is interested in educational requirements. That can be deduced from the language, "* * * the following character of study is required and acceptable; * * *." The question is then, may we eliminate the uncertain and unconstitutional parts of the regulation and preserve what is left. In construing an administrative rule, the same general principle of severance applies as is applied in the case of a statute. It is primarily a question of intent. In Indiana State Board of Medical Reg. v. Seulean (1941), 219 Ind. 321 at 326, the court said:

"* * * if the elimination of an invalid portion of an act will leave the remainder complete in itself, sensible and capable of being executed against all alike, the remainder will be enforced. * * *"

The above case was cited and the above principle applied in Perry Civil Twp. v. Indianapolis Power & Light Co. (1943), 222 Ind. 84, 92, 93.

Another excellent statement is that in State ex rel. Wisconsin Telephone Co. v. Henry (1935), 260 N. W. 486, 99 A. L. R. 1267 at page 1276:

"* * * It is well established that the elimination of even material provisions in an act as enacted, because of the invalidity of such provisions, does not render the remaining valid provisions thereof ineffective, if the part upheld constitutes, independently of the invalid portion, a complete law in some reasonable aspect, unless it appears from the act itself that the Legislature intended it to be effective only as an entirety and would not have enacted the valid part alone. * * *"
In the instant case, I think the Board would have promulgated the valid part alone, which leaves sub-paragraph (b) as a requirement of two years of pre-optometry or pre-medicine in a college of arts and science and three years of optometry study.

It is further the apparent intent of the Board, since acceptable credits are required, that the two years of pre-optometry or pre-medicine requires two years of passing work.

OFFICIAL OPINION NO. 9
February 10, 1948.

Colonel Robert Rossow, Superintendent,
Indiana State Police,
Stout Field,
Indianapolis, Indiana.

Dear Sir:

I have your letter of January 15, 1948 in which you make a request to furnish your department with an official opinion setting out whether or not the department may issue a license to carry a pistol to a person under twenty-one years of age, and also defining the rights of firearms dealers in regard to the sale of pistols to people who are not twenty-one years of age.

You particularly make reference to Burns' Indiana Statutes Annotated, 1933, Section 10-4702, same being Acts of 1905, Chapter 169, Section 450, page 584, which provides in substance that it is a misdemeanor to “sell, barter or give to any other person under the age of twenty-one (21) years any pistol, * * *.”

You also refer to Burns' Indiana Statutes Annotated, 1933, Section 10-4739, same being Acts of 1935, Chapter 63, Section 6, page 159, which provides that no person shall “deliver a pistol to any person under the age of eighteen (18) * * *.”

The title of the Act of 1905, Chapter 169, reads as follows:

“AN ACT concerning public offenses.”

I call your attention to a third statute, the Act of 1925, Chapter 207, the title of which reads as follows: