In the case of State v. Rardon (1943), 221 Ind. 154, 46 N. E. (2d) 605, 607-609, the Indiana Supreme Court approves and follows the holding of said court in the case of Mellot v. State, supra. In the State v. Rardon case, supra, it was held inmates of the Indiana State Prison could be legally transferred under Section 52-1104, Burns’ 1943 Supplement, supra, to a state prison farm in Porter County, Indiana, and on escaping therefrom, would be guilty of a violation of the “Escape Statute,” same being Section 10-1807, Burns’ 1942 Replacement.

Section 52-1104, Burns’ 1943 Supplement, supra, is the last expression of the legislature on the right to transfer a child from The Indiana Girls’ School to The Indiana Womans’ Prison, and is therefore controlling. No exception is made in such statute as to age limitation of any minor to be so transferred.

Under the above authorities it is my opinion the State Department of Public Welfare has authority to transfer this sixteen-year-old girl from the custody of The Indiana Girls’ School to The Indiana Woman’s Prison.

CORPORATIONS: Confusingly similar names. Duty of Secretary of State on complaint of fraud.

August 16, 1944.

Opinion No. 78.

Hon. Rue J. Alexander,
Secretary of State,
State House,
Indianapolis, Indiana.

Dear Sir:

This will acknowledge receipt of your letter of July 22nd, 1944, as follows:

“We are in receipt of a letter from Vivian D. Corbly, National Adjutant of the Disabled American Veterans, a copy of which you will find attached, requesting that we revoke the charter of the United States Disabled War Veterans, Inc.
"On the date of June 10, 1936, a copy of an act, (Public No. 186, 72nd Congress) (H. R. 4738), to incorporate the disabled American Veterans of the World War was filed in this office. On the 14th day of March, 1944, non-profit corporation papers, under the name of United States Disabled War Veterans, Inc., were filed and approved in this office.

"Now comes the original Disabled Veterans Organization claiming that we had not the right to grant the charter to United States Disabled War Veterans, Inc., on the grounds that it is a conflicting organization and that monies are being solicited from the citizens of Indiana through misrepresentation. This department, not having the authority to grant the request for revocation, respectfully requests a ruling from your department."

Your inquiry presents a consideration of several questions. If by conflicting organizations is meant competitive corporations, the fact that the Indiana corporation is a competitor of the federal corporation would not be grounds for revocation of a charter of the Indiana corporation according to the law of the State of Indiana as hereinafter set forth.

Your inquiry also presents a consideration of the question of conflicting corporate names as well as a consideration of the right to revoke a corporate charter. The section of the General Not for Profit Corporation Act dealing with names is Section 5 of Chapter 157 of the Acts of 1935 (25-511 Burns 1933, Pocket Supplement), which reads in part:

"* * * No corporation shall: (a) use as part of its corporate name any word or phrase which indicates or implies any purpose or power not possessed by corporations organizable under this act; or, (b) take or assume a corporate name the same as, or confusingly similar to, the name of any other corporation then existing under the laws of this state or authorized to transact business in this state, unless at the same time:

"(1) Such other corporation shall change its corporate name or withdraw from transacting business in this state, and,
“(2) The written consent of such corporation, signed and verified under oath by its president or a vice-president, and its secretary or an assistant secretary shall be filed with the secretary of state.”

The United States Disabled War Veterans, Inc., does not come within one of the exceptions since Disabled American Veterans has not withdrawn from the State of Indiana, nor is there any showing that it gave its written consent to the use of the second name.

There is no hard and fast rule to determine what names are confusingly similar. It is a question of fact to be determined by the evidence. The test seems to be “are the names so similar that intelligent people would readily confuse the names.”

Economy Food Products Co. v. Economy Grocery Stores Corporation, 183 N. E. 49.

The decision whether or not a name is confusingly similar is in the first instance that of the Secretary of State. The statute requires no notice or public hearing. As stated in 6 Fletcher Cyc. Corporations, page 14:

“The determination of the question of prohibited similarity is usually committed to some designated officer and the proceedings are, as a rule, ex parte.

* * *.”

And at page 15:

“* * * But the fact that the court or officer accepts and approves a particular corporate name and grants the application to incorporate under such name is not conclusive upon the question whether the name is sufficiently distinguishable from that of another corporation to satisfy the requirements of the law, nor does it preclude injunctive relief against the use of such name.

* * *.”

When the Secretary of State has decided that a name is not confusingly similar and approved the incorporation under
that name what, then, is the redress of an older corporation which claims that its rights in the use of a name are being invaded? It is clear that the Secretary of State would have no right to revoke a charter upon the basis of such a complaint even if he thought it was well founded, because rights have vested under that charter which can not be abrogated without proper notice and opportunity to be heard under the due process clauses of both the federal and state constitutions, and further because as an administrative office the Secretary of State possesses only such powers as are conferred upon him by the Constitution and statutes of Indiana, and neither in the Constitution nor statutes is there any authority for revocation of a corporate charter upon this basis.

See The Western Plank Road Co. v. The Central Union Telephone Co., 116 Ind. 229, where the court said at page 231:

"* * * Forfeiture can only be judicially declared and in the manner prescribed by law. * * * ."

The only provision in the General Not for Profit Corporation Act which touches upon the subject of revocation is Section 33 (25-539 Burns' 1933 Pocket Supplement), as follows:

"If the secretary of state at any time is of the opinion that any corporation organized or reorganized under this act is violating any of the provisions thereof, he shall notify such corporation in writing of such violation, and if such corporation does not comply with such provisions within fifteen (15) days thereafter, the secretary of state shall certify any such information to the attorney-general of Indiana, who shall forthwith bring an action in the name of the state of Indiana in the Marion County Superior or Circuit Court to dissolve such corporation."

Since he has already expressed his opinion that the name is not confusingly similar by issuing the charter, the violations therein contemplated must be of other provisions of the act.

As previously stated, however, the determination of the Secretary of State as to the name is not conclusive, and the corporation seeking redress may wish to pursue a private remedy by way of injunction against the later corporation. Upon that question I quote several excerpts from Vol. 6,
Fletcher Cyc. Corporations, dealing with the right to equitable relief. On page 21 it is said:

"It is fully established by the authorities that a corporation by first entering a particular field with a name adopted by it, and by prior appropriation and use, acquires a right to such name which the law will recognize and protect, independently of any statutory provisions on the subject. * * *"

At page 26:

"The principle of the cases upon the subject of preventing a corporation, association or an individual from using the name of a corporation previously appropriated and used by it proceeds upon the theory that it is a fraud on the corporation which has acquired a right to that name and perhaps carried on its business thereunder, that another should attempt to use the same name, or the same name with a slight variation in such a way as to induce persons to deal with it in the belief that they are dealing with the corporation which has given a reputation to the name. The injury guarded against is twofold, (1) Injury to the public by having palmed off upon it a spurious article believing it to be the product of the complaining corporation, and (2) injury to such corporation by having its trade diverted to the newcomer. * * *"

See:


At page 38:

"* * * The fact that the state issues a charter to a corporation by a certain name, or allows it to adopt a new name in place of the original one, does not give the corporation a right to use such name to the injury or prejudice of another company or association having a prior right thereto. * * *"

At page 73:

"The principles protecting against a wrongful or unfair use of a corporate name extend to all corpora-
tions, of whatever nature, including corporations not
formed for pecuniary profit. * * *.”

On the later point see also:

National Circle, Daughters of Isabella v. Na-
tional Order of Daughters of Isabella, 270
Fed. 723;
Knights of Ku Klux Klan v. Independent Klan
of America, 11 Fed. (2d) 881.

And on page 82:

“The considerations which prohibit the unlawful or
tortious utilization of corporate names are equally
applicable where the corporation is chartered by or
under the federal government as in the case of a na-
tional bank. * * *.”

It is suggested in the letter attached to your inquiry that a
fraud is being perpetrated upon the citizens of the State of
Indiana and of the United States by the later corporation in
addition to the use of a similar name. Solicitation of money
by the later corporation may or may not be fraudulent de-
pending upon the actual facts. However, if there are viola-
tions of the provisions of the General Not for Profit Cor-
poration Act, or if the charter was procured by fraud upon
the State of Indiana or has exceeded its authority, there are
two courses open: (1) Upon presentation to you of sufficient
facts or upon your own investigation facts are disclosed which
in your opinion show that the corporation is violating the pro-
visions of the act, then you may certify that information to
the Attorney General for action in accordance with Section 33
of the General Not for Profit Corporation Act, supra. (2)
Section 814 of Chapter 38 of the Acts of 1881, Special Ses-
sion, as amended by Section 2 of Chapter 221 of the Acts of
1929 (3-2001 Burns' 1933) provides as follows:

“An information may be filed against any person or
corporation in the following cases:

“* * *

“(5) Where the corporate franchise was procured
through fraud practiced upon the state.
“(6) Where the corporation has exceeded or abused the authority conferred upon it by law or has exercised authority not conferred upon it by law.”

In the latter case the proceeding is by information filed by the Prosecuting Attorney or an interested person as provided in Section 815 of Chapter 38 of the Acts of 1881, Special Session, (3-2002 Burns’ 1933):

“The information may be filed by the prosecuting attorney in the circuit court of the proper county, upon his own relation, whenever he shall deem it his duty to do so, or shall be directed by the court or other competent authority, or by any other person on his own relation, whenever he claims an interest in the office, franchise or corporation which is the subject of the information.”

In State ex rel. Voyles v. French Lick Springs Hotel Co., 42 Ind. App. 282, statutes similar to those in question were considered by the court. In that decision the court decided that the statute providing for the institution of proceedings through the Attorney General as well as the statutes providing for proceedings in the nature of quo warranto by the Prosecuting Attorney were alternative rather than mutually exclusive remedies.

As previously stated, you have no duty and in fact could not now reopen the question of similarity of names. It is therefore my opinion that your only present duty is as follows: If through facts revealed by investigation or by information presented to you you are of the opinion that the corporation is violating some other provision of the General Not for Profit Corporation Act, you should notify the corporation. If such corporation does not comply with the Act within fifteen (15) days of notice, then you should certify your information to the Attorney General as provided in Section 33, supra.