flict, there will be no question raised, and if at all in conflict, the present system in force in the Welfare Departments will control.

These answers only apply to employees in the Welfare Departments and do not apply to any other state employees in a merit system established under the provisions of said Chapter 139.

DEPARTMENT OF EDUCATION: Authority of Auditor to draw warrants for payment of claims under Chapter 93 of Acts of 1941. Sufficiency of appropriation.

August 8, 1941.

Department of Education,
Administration Division,
Clement T. Malan,
State Superintendent of Public Instruction,
Raymond Gladden,
Statistical Officer,
Indianapolis, Indiana.

Gentlemen:

I have before me your letter of the 16th inst., in which you request my opinion as to the ability of the Auditor of State to draw warrants for the payment of claims incurred under Chapter 93, p. 233, of the Acts of 1941, together with two other questions in your said letter submitted.

Chapter 93, Acts 1941, is "An Act concerning transfer tuition for public school children in hospitals for tuberculosis treatment, setting forth the amount of transfer tuition to be paid, providing for its payment, assigning powers and duties to school authorities, repealing all laws in conflict herewith and declaring an emergency."

QUESTION 1.

"May the Auditor of the State pay claims against the State of Indiana which have been made legal through the enactment of Chapter 93 of the 1941 Acts?"

This question involves:

(a) Art. 10, Sec. 3, of the State Constitution providing: "No money shall be drawn from the Treasury, but in pursuance of appropriations made by law," and,

(b) What amounts to an appropriation?

The law here simply provides:

> "The State Board of Department of Education shall be authorzed to order and the auditor of state shall pay not more than three-fourths the amount of such transfer tuition, but such child shall not be counted as a basis for computing any other regularly distributed state funds to such transferring school corporation."

At first glance it would appear that the foregoing language, taken by itself and apart from all other considerations, is wholly lacking in the essential elements of an appropriation. No money is expressly appropriated and no fund out of which such expenses so incurred is to be paid, is designated.

It is a policy of the law, however, to support legislation and give it effect if at all possible so to do. It is also quite generally recognized that where a law, through lack of an appropriation is unenforceable, it is ineffective and generally held for naught.

In this situation, then, if this law is to be upheld and enforced, it is essential that an appropriation be found to sustain it.

Perhaps the leading case upon this phase of the question in our state seems to be *Carr, Auditor, et al.* v. *State ex rel. Coetlosquet,* 127 Ind. 204.

At page 209 of the opinion, in reference to what may constitute an appropriation, the court used this language, to wit:

> "It does not, however, follow that because no claim can be enforced where there is no appropriation, the appropriation must be made in a particular form or in express terms. It is sufficient if the intention to make the appropriation is clearly evinced by the language employed in the statutes upon the subject, or if it is evident that no effect can possibly be given to a statute unless it is construed as making the necessary appropriation. In *Ristine* v. *State ex rel.,* 20 Ind. 328, it was said:
>
> > " 'An appropriation of money to a specified object would be authority to the proper officer to pay the money, because the auditor is authorized to draw his warrant upon an appropriation and the treasurer is authorized to pay such warrant if he has appropriated money in the Treasury and such an

> appropriation may be prospective, that is, it may be made in one year, of the revenues to accrue in another year or future years, the law being so framed as to address itself to future revenues. So a direction to the officers to pay money out of the Treasury upon a given claim or for a given object, may, by implication, include in the direction an appropriation.' "

I have been unable to find that the *Carr* case, *supra*, has ever been overruled, distinguished or criticized. On the contrary, I find that it has been followed not only in this state but elsewhere as well. (See *Henderson* v. *State Soldiers, etc., Monument,* 129 Ind. 101.)

In *Gaffill* v. *Bracken,* 195 Ind. p. 551, at p. 561 of the opinion, it was held that:

> "There is no merit in the contention that provisions for rebate of money paid for gasloine not used in operator motor cars requires money to be drawn from the state Treasury otherwise than in pursuance of appropriations made by law. The terms of this statute sufficiently make the necessary appropriation for payment of all lawful rebates."
>
> (Carr v. State, *supra.*)

The Act involved in the *Gaffill* case, *supra,* failed to make any express or direct appropriation for the payment of rebates but sets aside license fees collected in a special fund for the payment of expenses and rebates among other things.

And to the same general effect was the opinion of this office rendered to the Bureau of Motor Vehicles under date of April 28, 1939, covering disbursement and disposition of notary fees collected by the Bureau. (See Attorney General's Opinions 1939, p. 141.)

From these opinions and the principles therein recognized and laid down it is apparent:

1. That if there is anything in an Act of the Legislature from which it is intended to make available any moneys out of which to pay expenses incident to its enforcement, then the Act must be upheld;
2. That the necessary appropriation is construed as having been made "if it is evident that no effect can possibly be given to a statute" without such construction;

3. That an appropriation may be "prospective, that is, it may be made in one year, of the revenues to accrue in another or future years."

(The above quotations are from *Carr* v. *State, supra.*)

Applying these principles to the Act here questioned, we find:

1. That while the Act itself fails to make an express appropriation, it does empower "the State Board of Department of Education" to order and the Auditor of State shall pay not more than three-fourths, etc."

While this language fails to designate any sum or amount to be paid or any fund out of which such payments shall be made, it is an authority for the Auditor of State to pay:

2. That this authorization to pay, as provided in said Act, is rendered ineffective and the whole Act must become unenforceable, if it is construed otherwise than as making an appropriation for the enforcement of the Act, then such authorization to pay should be construed as itself an appropriation under the authority cited.

   Moreover, as the language of the Act is a direct mandate upon the Auditor of State to pay (tuition cost) upon the order of the Board of Department of Education, it must be taken and can only mean that such cost is to be paid out of funds not otherwise appropriated in the general fund in the state Treasury.

For these reasons, I have reached the conclusion that the answer to your first question should be in the affirmative.

QUESTION 2.

"Are the Tubercular Institutions which are mentioned in this law entitled to make claims for tuition for legally transferred students in their Institution for the school year 1940-1941?"

In my opinion, your second question should be answered in the negative.

The instruction of children is not an obligation imposed upon the tubercular institutions in which they may be patients. This is the obligation of the school corporation whose duty it is, under

the law, to undertake the instruction of these children. There is no privity of contract between the school corporation and the tubercular institution in these cases. The liability is that of the school corporation and a tubercular institution accordingly would have no claim. The claim would be in favor of the teacher or instructor hired by the school corporation to render these instructions.

QUESTION 3.

"Are they entitled to make such a claim for the period beginning March 4th?"

My answer to this question must also be in the negative. As they (the tubercular institutions) are not entitled to make any claims for such services, it is immaterial when, if ever, such a claim should be presented.

STATE BOARD OF ACCOUNTS: STATE EXAMINER: Contributions applicable under Teachers' Retirement Fund Act where service not continuous.

TEACHERS' RETIREMENT FUND: Contributions applicable under this Act where service not continuous.

August 11, 1941.

Mr. Otto K. Jensen,
State Examiner,
State Board of Accounts,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter requesting an official opinion with respect to certain questions arising under the Teachers' Retirement Fund Act respecting certain actuarial aspects of the law in cases in which the teaching service is not continuous from the date when service begins. This question applies not only in cases of intermittent service after the Act became effective and after the teacher became a member of the Fund, but applies also in cases where prior service is allowed under the express terms of the Act.

Section 28-4506 of Burns' Indiana Statutes Annotated 1933, June, 1941, Cumulative Pocket Supplement contains a table