> cannot properly be said to include inter-scholastic sports and games, viz: inter-school basketball as may be engaged in between picked teams of the various public, private and parochial schools constituting the membership of relator Athletic Association."

Under the foregoing authorities and due to the fact the Indiana Legislature has failed to authorize such expenditures, I am of the opinion expenditures may not be made from the Special School Fund for physical examinations of students participating in inter-scholastic athletic contests, or for the attendance of a physician at such athletic contests.

Under the above authorities payment for any such services cannot be made from public funds, but must come from extra-curricular funds or donations.

OFFICIAL OPINION NO. 37

August 8, 1961

Mr. John T. Hatchett
Director of the Budget
State of Indiana
302 State House
Indianapolis 4, Indiana

Dear Mr. Hatchett:

In your letter dated June 23, 1961, receipt of which I have previously acknowledged, you have stated the following questions:

> "Chapter 123, Acts of 1961, Section 14—Standards to Guide Executive Including Administrative Discretion—establishes certain restrictions regarding the use of an emergency or contingency appropriation.
>
> "Chapter 298, Acts of 1961, Section 2, appropriates $2,000,000 each year to the Budget Agency for the State Departmental and Institutional Contingent Appropriation which appropriation is qualified by the following paragraph:

> " 'The foregoing contingency appropriations shall be subject to allotment to departments, institutions, and all State agencies by the Budget Agency with the approval of the Governor. Such allocations may be made upon the written request of proper officials, showing that contingencies exist which require additional funds for meeting necessary operating expenses.'
>
> "1. Is there any conflict between the foregoing paragraph and the restrictions stated in Chapter 123, Acts of 1961, Section 14?
>
> "2. Does the foregoing paragraph add any additional restrictions regarding the use of the Contingency appropriations?
>
> "3. Does the term 'exhausted fund' used in Chapter 123, Acts of 1961, Section 14, Paragraph 6, mean that the fund must be completely without funds before a transfer can be made?"

When it is necessary to compare statutes it is helpful to examine the basic purpose of each. The Acts of 1961, Ch. 298, pp. 741 to 811, approved March 10, 1961 and effective from and after that date, is an act by which the General Assembly made appropriations for the conduct of state government for the biennium period commencing July 1, 1961 and ending June 30, 1963, which appropriations are itemized with respect to the various offices, boards, commissions, departments, agencies and institutions to which such appropriations are made, to be used by such for the specific purposes therein designated. Among such itemized appropriations is that to which your inquiry makes reference, the "State Departmental and Institutional Contingent Appropriations" on p. 797, to the Budget Agency; and which appropriation is qualified in the language which you have quoted.

The other enactment to which you refer, the Acts of 1961, Ch. 123, approved March 6, 1961 and effective from and after that date, and to be known as "The Budget Agency Act," is in no sense an act by which the General Assembly made appropriations. It does not contain any item which appropriates

any amount of funds to any office or agency of state government, but rather its purpose is that of creating a Budget Agency and defining the powers of such Agency, and also creating a Budget Committee and defining the powers of such Committee. This act concerns appropriations made or to be made by *other* laws, in that it defines the powers of the Budget Agency or Budget Committee, both with respect to the execution and administration of appropriations already made, and with respect to the fiscal affairs of the state in the preparation of budget reports and budget bills to be recommended to future sessions of the General Assembly for the possible enactment into appropriations at a later time. Such definition of powers as to future appropriations is, of course, subject to any specific provisions to the contrary in subsequent appropriation Acts. The provisions in question, in the Acts of 1961, Ch. 123, Sec. 14, as found in Burns' (1961 Supp.), Section 60-414, are as follows:

> "(a) In the absence of other directions, purposes or standards specifically imposed therein, or otherwise fixed by law, an emergency or contingency appropriation to the budget agency which is general and unrelated to any specific agency of the state shall be for the general use, respectively, of any agency of the state, shall be for its emergency or contingency purposes or needs, as the budget agency, in each situation, shall determine and shall fix the amount to transfer, and shall order transfer thereof from such appropriation to the agency of state relieved thereby. From such emergency or contingency appropriations, the budget agency is hereby empowered to make and order allocations and transfers to, and to authorize expenditures by, the various agencies of the state to achieve the purposes, or meet the needs, circumstances and standards following, namely:
>
> "1. Necessary expenditures for the preservation of public health, and for the protection of persons and property which were not foreseen when the appropriations were made by the previous general assembly.
>
> "2. Repair of damage to, or replacement of, any building or equipment owned by the state or by any

agency of the state which has been so damaged as to materially affect the public safety or utility thereof, or which has been destroyed, if such is necessary to discharge the functions of the state or of any agency of the state, and if such damage or loss was caused by sabotage, fire, flood, wind, war, catastrophe or disaster.

"3. Repair of damage to, or replacement of, any building or equipment owned by the state or by an agency of the state which has so depreciated or deteriorated or suffered obsolescence as to become unusable, but is required in the discharge of necessary functions of the state or of an agency of the state, and if such depreciation, deterioration or obsolescence was not foreseen at the time appropriations were made by the previous general assembly.

"4. Emergencies resulting from increase of costs or any other factor or event unforeseen at the time appropriations were made which render insufficient the appropriated funds for food, clothing, maintenance or medical care necessary for the operation of any state institution.

"5. Emergencies resulting from increase in costs or any other factor or event unforeseen at the time appropriations were made which render insufficient the appropriated funds for the cost of instruction or other costs of operation of any of the four [4] state agencies of higher education.

"6. In addition to and without limitation by the foregoing, supplementation of an exhausted fund or account of any state agency, whatever the cause of such exhaustion, if such is found necessary to accomplish the orderly administration of such state agency, or the accomplishment of an existing specific state project: Provided, however, That it shall be an express condition of any such supplementation, that such funds shall not serve to authorize a purpose or purposes which were included in the budget bill, or budget bills, to the previous general assembly but were wholly omitted or excluded from appropriations made by the general assembly.

> "The provisions of this section shall not change, impair or destroy any fund previously created, nor be deemed to affect the administration of any contingency or emergency appropriations heretofore or hereafter made for specific purposes. * * *"

In reply to your first question, it is my opinion that no actual conflict exists between the two acts in question, and any seeming conflict between them can be reconciled easily by a proper interpretation and application of standard rules of statutory construction.

That the Legislature intended these acts to be administered harmoniously together is evidenced by the fact that Ch. 298, *supra,* specifically provides for the allotment from the subject appropriation by the Budget Agency (with the approval of the Governor) upon the written request of proper officials showing that contingencies exist requiring additional funds for necessary operating expenses, while Sec. 12(f) of Ch. 123, as found in Burns' (1961 Supp.), Section 60-412(f) definitely contemplates that the Budget Agency will have contingency appropriations made to it, the allocation of which to state agencies will be under the control of the Budget Agency. Also, Sec. 14 of Ch. 123, *supra,* lists the contingencies, six in number, of which at least one must be shown to exist before additional contingency funds may be allocated.

One rule of statutory construction, applicable to your first and second questions, provides that related statutes, whether enacted at the same session of the Legislature or not, which acts concern the same subject matter and are *in pari materia,* should be construed together so as to produce a harmonious system of legislation, if possible, thereby giving full force and effect to each act in question.

> Starr v. City of Gary (1934), 206 Ind. 196, 200, 188 N. E. 775.

Acts 1961, Ch. 298, Sec. 2, appropriates $2,000,000 each year to the Budget Agency for the State Departmental and Institutional Contingent Appropriations and contains the qualifying provision set forth in your letter. Acts 1961, Ch. 123, Sec. 14, as found in Burns' (1961 Supp.), Section 60-414

(The Budget Agency Act), contains a set of standards to guide executive and administrative discretion in respect to such contingency appropriations.

A careful reading of the pertinent provisions of the two acts, making application of the rule of statutory construction aforesaid, leads me to the conclusion that the objectives of the said acts are substantially the same, that they are compatible, and that both may be given legal effect. Neither of these statutes is amendatory of a former single law or of the same section thereof, but rather each is a separate and independent act. It is fundamental that our courts, when interpreting a statute, will not presume that the same session of the Legislature intended to do a useless thing by enacting independent inconsistent laws whereby one act would defeat the purposes of the other, unless such intention is made clearly to appear.

Your second inquiry raises the question as to whether the provision in Acts 1961, Ch. 298, Sec. 2, *supra,* which you quote in your letter, imposes any additional restrictions regarding the *use* of the subject appropriations. In my opinion the particular appropriation to which you refer must be regarded as a contingency appropriation to be allocated for the purposes set forth in Acts 1961, Ch. 123, Sec. 14, *supra,* subject to the provisions of the said Appropriation Act of 1961, Ch. 298, Sec. 2, *supra.*

As stated by your letter, the Appropriation Act requires the allotment thereof to be made by the Budget Agency with the approval of the Governor, and indicates that such allocations are to be made only in such contingencies as require additional funds for "necessary operating expenses." "Operating expense" is defined on p. 742 of Ch. 298 of the Acts of 1961. "Necessary operating expenses," as used with respect to this appropriation, is specifically defined on p. 743 of the Acts of 1961, Ch. 298 to exclude the use of such appropriation for the acquisition of equipment, it there being stated:

> "The term 'Departmental and Institutional Contingent Appropriation' as used in this Act shall mean an appropriation *to be used for necessary operating expenses, not including equipment,* of departments and institutions, and all State agencies, in addition to other specific appropriations made in this Act for such oper-

> ating expenses. Said Contingent Appropriation shall be allocated to the several State agencies as provided herein." (Our emphasis)

It is to be noted that the appropriations for state departmental and institutions contingent funds for equipment immediately precede the appropriation in this Section 2 to which you refer, and that the term "operating expense" includes all of the following: personal service, services other than personal, services by contract, supplies, materials, parts, grants, subsidies and awards.

In addition to the restrictions above provided by Ch. 298, *supra,* is the general express condition contained in Sec. 14, Par. 6 of Ch. 123, *supra,* that such funds as may be allocated from any emergency or contingency appropriation are not authorized to be allocated to a state agency for:

> "* * * a purpose or purposes which were included in the budget bill, or budget bills, to the previous General Assembly but were wholly omitted or excluded from appropriations made by the General Assembly."

Your third inquiry raises the question as to whether or not the term "exhausted fund" as used in Acts 1961, Ch. 123, Sec. 14, Par. 6, *supra,* means that the fund (and I assume you refer to any existing fund to which moneys are allocated by the Budget Agency) must be completely depleted (no money remaining) before a transfer of contingency funds can be made.

I am of the opinion that the use of the term "exhausted fund" by the General Assembly does not require, as a condition precedent to supplemental allotment from the contingency appropriation, that an existing fund must be completely and physically depleted before it can be replenished; but rather that a fund may be regarded as "exhausted" when the balance has been used up by actual payment of all the money in the fund, or when the fund is completely pre-empted, obligated or encumbered. A synonym of "exhaust" is "spend," and we are all very much aware of the fact that the state, as well as an individual, frequently obligates or "spends" its money well in advance of actual payment by warrant of the State Auditor.

See: 1945 O. A. G., p. 554, No. 128.

It has been judicially determined that assets are "exhausted" when they have been sold even though the proceeds of the sale had not yet been paid out to satisfy outstanding obligations.

> Hoffman v. Geiger *et al.* (1938), 135 Nebr. 423, 281 N. W. 625.

It should also be noted that the provisions of Ch. 123, Sec. 14, *supra,* do not require that the *decision* to make the particular allotment to an exhausted fund must await the complete encumbering of that fund, and such decision may be made properly in advance of that point, upon the basis of reasonable anticipation of the exhaustion of the fund in the immediate future, so that the supplemental allotment may thereafter be immediately entered and transferred when the fund is in fact completely obligated and encumbered. It appears to me that the word "exhausted" was chosen advisedly by the General Assembly to express its intent that a contingency appropriation could not be used as a means of discretionary budgeting on the part of the Budget Agency rather than allocation on the basis of immediate specific need which could not be foreseen in detail by the General Assembly.

In conclusion, then, it is my opinion that there is no conflict between the provisions of Section 2 of the Appropriation Act (Acts of 1961, Ch. 298) and Section 14 of "The Budget Agency Act" (Acts of 1961, Ch. 123) ; the provisions of Section 2 of the Appropriation Act do require the additional specific approval of the Governor as to allocations from the contingency appropriation, and also serve to clarify any question that might be raised in respect to the use of the $2,000,000 appropriation by restricting such to necessary operating expenses, "not including equipment"; and the term "exhausted fund" refers to a fund which has either been completely and physically depleted or which has been completely pre-empted, obligated or encumbered although a balance which has not been actually paid out may yet remain.