trast, involves older college-age students. These are people who have the ability to make a free choice and competently to distinguish between that which is voluntary and that which is mandatory.,

It is our opinion, for the foregoing reasons, that the State colleges may permit voluntary, extracurricular student religious organizations, as they have been described herein, to function on State college campuses and make reasonable use of college facilities for their activities. Such action does not contravene the provisions of the First Amendment to the United States Constitution.

Very truly yours,
ARTHUR J. SILLS
Attorney General of New Jersey
By: HOWARD H. KESTIN
Deputy Attorney General

September 14, 1965

HONORABLE JOHN A. KERVICK
Treasurer of the State of New Jersey
State House
Trenton, New Jersey

FORMAL OPINION 1965—NO. 2

Dear Mr. Kervick:

You have requested our opinion with respect to whether there could be established by the State a governmental authority to provide student dormitory and related facilities at the various State public colleges and the State University. You have also requested our opinion with respect to whether such a governmental authority could furnish dormitory and attendant facilities and other academic buildings and projects, such as libraries, laboratories and the like, for the benefit and use of students attending private colleges and universities in the State.

We are advised that this inquiry is prompted by specific requests, information and investigations of the Commissioner of Education who has underscored the great shortage of student residence and other related facilities at the various State higher educational institutions. It has also been indicated that there is a similar need on the part of many private institutions in the State and that there has been expressed an interest in developing a cooperative program between the State and such private institutions in order to facilitate and accelerate the construction of dormitory and incidental facilities and other needed academic buildings and projects. In this context the State Commissioner of Education and you ask whether it is legally possible for the State to embark upon such a program through a governmental instrumentality and whether such an instrumentality or public authority could function in a manner similar to the Dormitory Authority of the State of New York.

We are informed that the Dormitory Authority of the State of New York is a

public corporation which has functioned in the spheres of private as well as public education. With respect to the public colleges and universities of the State, the New York Authority has constructed, maintained and operated dormitories and related facilities such as dining halls and student meeting rooms. The projects which are constructed by the Authority are planned, developed and operated cooperatively with the State and the particular State college. Early in the program projects were financed by both the proceeds of Authority bonds and State appropriations, but at the present time, you inform us, these facilities are financed essentially through student fees and the program is not dependent upon State appropriations. The Authority does not furnish academic buildings such as libraries and laboratories to State institutions. (You have pointed out in your request that such facilities are provided directly by the State colleges and are wholly dependent upon State appropriations. Consequently, you do not presently seek our advice as to whether a New Jersey Authority could be empowered to provide buildings of this type to the public colleges.) In the area of private colleges and universities the New York Authority constructs and provides academic buildings in addition to dormitories and incidental facilities for the benefit and use of students. Plans are developed and executed in cooperation with the particular institution. The Authority charges the private institutions directly for the use and occupancy of all buildings and facilities provided. These projects are self-liquidating being financed primarily through the proceeds of Authority bonds. In its operations of the various facilities, with respect to both public and private institutions, the New York Authority now leases the facilities to the particular institution which operates and maintains the facility and pays rentals and charges sufficient to defray the costs of the Authority including the principal and interest on its obligations and certain operating expenses. During the term of the lease title to the property involved is in the State Authority but it vests in the institution or the State upon the expiration of the term.

In answering your request for advice, based upon such facts and information which you have furnished, we have not concerned ourselves with the feasibility or practicability of such a program to be conducted in the State by a public authority. In reviewing these problems we have addressed ourselves only to the broad question posed, namely, whether it is legally possible for the State of New Jersey to establish a public governmental authority to provide dormitory and related facilities for students in the State colleges and University and such facilities and other academic buildings for students attending private institutions of higher education in the State. We are of the opinion for the reasons herein set forth that such a program is legally possible.

I.

It is widely thought that the decision of *McCutcheon v. State Building Authority*, 13 N.J. 46 (1953) would preclude the establishment by the State of a governmental authority for the purpose of furnishing buildings for State use. In this case the Supreme Court determined that the "State Building Authority" established by L. 1950, c. 255, as amended, N.J.S.A. 52:18A-50, *et seq.* was unconstitutional. This Authority was established in the Department of the Treasury as a body corporate and politic and constituted "an instrumentality exercising public and essential governmental functions". N.J.S.A. 52:18A-51. Its specific functions were the acquisition, construction and operation of buildings for the use and occupancy of various State departments and divisions. It was also to furnish housing for employees of State institutions. N.J.S.A. 52:18A-52. The Authority was given broad powers to acquire

and dispose of property and to construct and maintain projects, and to lease projects and contracts for the use of space, but such leases and contracts could only be with the State or its departments, agencies and instrumentalities. *Ibid.* It could charge rents and other fees to defray expenses of the Authority, the costs of construction, repair and operation of its facilities and the repayment of principal and interest on its obligations. N.J.S.A. 52:18A-60. The State was empowered by the Act to enter into leases or contracts with the Authority, and to pay rentals and other charges, and it was specifically provided that "any such contract shall be valid and binding upon the department, agency, or instrumentality of the State, notwithstanding that no appropriation was made or provided to cover the cost or estimated cost of the contract." N.J.S.A. 52:18A-61. The Authority was empowered to issue bonds payable out of its revenues and to pledge all or any part of its revenue to secure their repayment (N.J.S.A. 52:18A-66), but its bonds were deemed not to constitute a debt or liability of the State or a pledge of the State's faith and credit (N.J.S.A. 52:18A-68), although the State did pledge and agree with the holders of the bonds that it would not limit or restrict the rights vested in the Authority to construct, maintain or operate any project to collect revenues. N.J.S.A. 52:18A-69.

A majority of the Court held that the obligations incurred pursuant to the State Building Authority Act of 1950 were contrary to the *N.J. Const.* (1947) *Art.* VIII, *Sec.* II, *para.* 3. This provision prohibits the incurrence in any fiscal year of debts or liabilities of the State, which, together with previous obligations, exceed at any one time 1% of the total appropriation of the particular fiscal year unless duly approved by the voters at a public referendum. It was determined that the law violated this constitutional limitation because, while in form it provided a way of furnishing the State with leasehold interests in building facilities for public use, in reality the design of the act was to enable the State by contracts of purchase to acquire buildings for State use. 13 N.J. at 57. The Court stated:

> "While the payments thus made by the State through its governmental agency take the form of 'rentals,' they are in substance and effect the purchase price of the property, for they are to be sufficient in amount to defray the Authority's operating expenses and in the end to liquidate the principal of the bonds and the interest accruing thereon *** These are not leases, *** but contracts of purchase, by the sovereign for public use; the 'rentals' constitute appropriations made by the State, not alone to provide operating expenses, but in *quantum* sufficient for the ultimate payment and retirement of the bonds. A true lease rental is compensation for the use of the property, not the consideration price for its purchase. (13 N.J. at 59, 60.)

The specific problem raised by the *McCutcheon* case is whether the operation of a state dormitory authority to provide dormitory and related facilities for the State colleges and University, and these and other academic buildings for students of private institutions in the State would necessarily be violative of the debt limitation clause of the New Jersey Constitution in a manner similar to the former State Building Authority. It is noteworthy that the specific legal infirmities which led to the invalidation of the State Building Authority Act of 1950 have been obviated with respect to other existing state instrumentalities, specifically the New Jersey Turnpike Authority (referred to herein as Turnpike), the New Jersey Highway Authority (referred to herein as Parkway) and the New Jersey Expressway Authority (referred to

herein as Expressway). Each of these authorities is a public body corporate and politic, exercising essential governmental functions. N.J.S.A. 27:23-3(A) and 5 (Turnpike); N.J.S.A. 27:12B-4 and 5 (Parkway); and N.J.S.A. 27:12C-4 (Expressway), and is authorized to acquire, contract, maintain and operate its particular project. N.J.S.A. 27:23-1 (Turnpike); N.J.S.A. 27:12B-2 (Parkway); and N.J.S.A. 27:12C-2 (Expressway).

The authorities do not rely on annual appropriations from the Legislature. The Turnpike and Parkway are specifically prohibited from receiving and accepting such appropriations. N.J.S.A. 27:23-5(n) (Turnpike); N.J.S.A. 27:12B-5(r) (Parkway). The authorities are authorized to issue bonds and notes, N.J.S.A. 27:23-7 (Turnpike); N.J.S.A. 27:12B-8(a)(b), and 9(c) (Parkway); and N.J.S.A. 23:12C-21(A)(B) (Expressway), and to fix, charge and collect tolls for the use of their roads and to contract for rents and charges for other necessary uses. N.J.S.A. 27:23-9(a) (Turnpike); N.J.S.A. 27:12B-14 (Parkway); N.J.S.A. 27:12C-26 (Expressway). The State has pledged to the respective bondholders not to limit or restrict the rights vested in the respective authorities until the bonds have been fully paid and discharged. N.J.S.A. 27:23-7 (Turnpike); N.J.S.A. 27:12B-11 (Parkway); and N.J.S.A. 27:12C-41 (Expressway).

In *New Jersey Turnpike Authority v. Parsons*, 3 N.J. 325 (1949) the Supreme Court upheld the constitutionality of the Turnpike Act in the face of contentions similar to those raised in the *McCutcheon* case. The Court found that the Turnpike Act did not violate the debt limitation provisions of the State Constitution, since there was no State liability imposed by the statute creating the Turnpike Authority and that the Authority was expressly limited to the repayment of its obligations from its tolls and other revenues and that the faith and credit of the State was in no wise pledged. While the Authority "is in, but not of the State Highway Department," the Court noted "that fact does not make it any less an independent entity." 3 N.J. at 244. See also *Behnke v. New Jersey Highway Authority*, 13 N.J. 14 (1953); compare, *Safeway Trails Inc. v. Furman*, 41 N.J. 467, 475 (1964). In contrast, the Court in the *McCutcheon* case found that the former State Building Authority was "not a toll or self-sufficient facility", that it was obligated to deal only with the State of New Jersey and that the State Treasury was the "sole source of its revenue". 13 N.J. at 62.

It does appear that a state dormitory authority could be created for the purpose of providing needed facilities for the benefit of students attending institutions of higher education in the State of New Jersey without violating the debt limitation clause of the New Jersey Constitution. Such an authority could, for example, be structured on lines similar to the Turnpike, Highway and Expressway Authorities and be constituted an independent public corporation created to discharge "essential governmental functions" of the State and be vested with the general statutory powers and attributes now entrusted to the existing authorities. The operations of the proposed authority would have to be provided in such a manner that it would not necessarily or as a matter of statutory enactment be solely or exclusively dependent upon revenues of the State for the proper and complete discharge of its functions. The authority could have the power to incur debts and liabilities and to issue bonds or notes, to acquire, construct, maintain and operate its lawful projects and to provide the mode for repayment of the principal and interest on its bonded indebtedness. Thus, such an authority could derive revenue from the operation of its projects to defray expenses and for the repayment of its obligations by charging reasonable rents or fees to students and others using and enjoying the facilities which it will provide. Such an authority might also secure revenue through grants and low interest, long-term loans

from the federal government for the purpose of constructing dormitories and similar student housing establishments[2] and other academic facilities.[3] It is also important to emphasize that there does not appear to be any absolute prohibition against such an authority accepting State funds through legislative appropriations from time to time, provided that the Legislature does not pledge to do so or the enabling statute does not obligate the State to make such appropriations.[4] Moreover, to the extent that such an Authority does deal directly with the State or its departments, agencies and instrumentalities, it would be possible to avoid the particular features of the leasing agreements which were considered by the Court in the *McCutcheon* case to constitute present and continuing obligations of the State in the nature of contracts to purchase property without providing the full appropriations for the entire cost of acquisition therefor in violation of the constitutional debt limitation clause.[5]

II.

Another legal question engendered by the proposal to utilize a state authority to provide residential and educational facilities for institutions of higher education is whether such a program would violate those clauses of the New Jersey Constitution which prohibit the donation, appropriation or expenditure of public property or funds to or for the use of any individual, association, society or corporation. *N.J. Const.* (1947), *Art.* VIII, *Sec.* II, para. 1, *Sec.* III, paras. 2 and 3. The problem is underscored by the proposal to permit the program to function in the area of private as well as public education.

The essential test in determining whether a particular governmental program violates the constitutional proscription against a donation, appropriation or loan of public property or moneys or an extension of public credit is whether it is enacted for a recognized public purpose. *Whelan v. N.J. Power & Light Co.*, 45 N.J. 237 (1965); *Lynch v. Borough of Edgewater*, 8 N.J. 279, 291 (1951); see also, *City of Camden v. South Jersey Port Commission*, 4 N.J. 357, 367-369 (1951). An expansive understanding of the concept of what constitutes a public purpose is exemplified in the landmark decision, *Roe v. Kervick*, 42 N.J. 191, 207 (1964):

> "The concept of public purpose is a broad one. Generally speaking, it connotes an activity which serves as a benefit to the community as a whole, and which, at the same time is directly related to the functions of government. Moreover, it cannot be static in its implication. To be serviceable it must expand when necessary to encompass changing public needs of a modern dynamic society. ***."

If the objectives of a program relate to the important functions or obligations of government, it is not impermissible for the State to utilize independent public agencies or authorities, or even the services of a third person or a corporation to accomplish the public objective. *E.g., Whelan v. N.J. Power & Light Co., supra;* 45 N.J. at 246; *City of Camden v. South Jersey Port Commission, supra; Romano v. Housing Auth. of Newark*, 123 N.J.L. 428 (Sup. Ct. 1939), *aff'd*, 124 N.J.L. 452 (E. & A. 1940); *Rutgers College v. Morgan*, 70 N.J.L. 460 (Sup. Ct. 1904), *aff'd* 71 N.J.L. 663 (E. & A. 1905); *cf., McNichols v. City and County of Denver*, 101 Colo. 316, 74 P. 2d 99 (1937); *Hager v. Kentucky Children's Home Soc.*, 119 Ky. 235, 83 S.W. 605 (Ct. App. 1904). As stated by the Supreme Court in *Roe v. Kervick, supra*, at 217, "if the purpose of a statute be public *** the means of accomplishing it laid

down thereby ought to be regarded as a matter of valid legislative policy so long as the means are restricted to the public end by the legislation and contractual obligation." A program which envisages the application of public moneys or property to discharge a governmental function for the public welfare is not vitiated because incidental benefits may accrue to private persons. *Roe v. Kervick, supra; Morris & Essex R.R. v. Newark*, 76 N.J.L. 555 (E. & A. 1908); *Redfern v. Jersey City*, 137 N.J.L. 356 (E. & A. 1948); *Roan v. Connecticut Industrial Building Comm'n.*, 150 Conn. 333, 189 A. 2d 399 (Sup. Ct. Err. 1963).

Without question government may take measures to protect and enhance the welfare of its citizens in areas vital to survival and happiness such as housing (*Romano v. Housing Auth. of Newark, supra*), employment (*Roe v. Kervick, supra*), or transportation (*Morris & Essex R.R. v. Newark, supra*). Beyond peradventure a salient function and obligation of government is to provide for the education of its citizens. The right, as well as the duty, of government to assist in the education of its people is not confined to students attending only public institutions of learning but includes also students matriculating at private institutions which constitute a major educational resource available in the State. *Cf., Everson v. Board of Education of Ewing Township*, 133 N.J.L. 350, 353, 355 (E. & A. 1945), *affirmed*, 330 U.S. 1, 91 L.Ed. 711 (1947), *reh. den.* 330 U.S. 855, 91 L.Ed. 1297 (1947) (upholding the appropriation of State funds for transportation of private school students along the regular public school route; the Court emphasized the fact that the program envisioned public assistance for the benefit of the students). It is clearly within the competence of government to provide and further the educational opportunities of its citizens and this may be accomplished directly through public institutions or indirectly through private colleges or universities. As stated by the Court in *Trustees of Rutgers College in New Jersey v. Richman*, 41 N.J. Super. 259, 299 (App. Div. 1956):

> " 'Rutgers, The State University', as now constituted, is a public instrumentality for the accomplishment of a public purpose, i.e., public higher education in the State. Nevertheless, a substantial *quid pro quo* for [*sic* the] latter purpose would justify state appropriations within *Article* VIII, *Section* III, paragraph 3, even to a predominately private corporation or association. Thus, even were it held (and I do not so find) that 'Rutgers, The State University' is a private institution, that institution, acting through its Board of Governors, would be under a substantial and definite obligation to the State for the fulfillment of a public purpose. That obligation is adequate consideration to sustain state donations or appropriations."

Thus, if governmental assistance is designed to benefit students, and the institutions which are the recipients of such assistance are committed to fulfill the State's educational policies, it would not be an unconstitutional donation or application of public moneys to include private colleges or universities within the ambit of such a program.

III.

We conclude that the State may develop a program to provide student dormitory and related facilities for the State colleges and the State University and to provide such facilities and other academic buildings for private institutions of higher educa-

tion within the State, and that, in the context of the foregoing analysis, such a program would not be contrary to provisions of the New Jersey Constitution with respect to State debt limitations or donations or appropriations of public funds and property. We are of the opinion, therefore, that, within the framework presented, it would be legally permissible for the State to establish a public authority or governmental instrumentality, the function of which would be to acquire, construct and furnish dormitories and attendant facilities such as dining halls for the State colleges and the State University, and to provide these facilities as well as other academic buildings such as libraries and laboratories for the benefit of students attending private institutions of higher education in the State.

Very truly yours,
ARTHUR J. SILLS
Attorney General of New Jersey

By: ALAN B. HANDLER
First Assistant Attorney General

1. There is no provision in the Expressway Act covering this situation. The section similar to the above sections omitted the exception as to legislative appropriations. N.J.S.A. 27:12C-5(n). See, N.J.S.A. 27:12C-21(b) pledging contributions from the State. N.J.S.A. 27:12C-27, however, provides that no property of the State, aside from riparian lands, shall be granted, leased or conveyed to the Expressway Authority except upon payment to the State of such price therefor (if any) as fixed by the State House Commission. The Expressway Act does permit political subdivisions to extend aid and cooperation to this Authority. N.J.S.A. 27:12C-27 to 31.

2. Under the National Housing Act of 1950, 12 U.S.C.A. § 1749, a program is provided to permit the erection of new structures and for the rehabilitation or alteration of existing structures for students' dwelling use and for "other educational facilities" including cafeterias, dining halls and student unions. *Id.* § 1749 c(a). The State is not required to produce matching funds and the federal loan may be for the full amount of the development costs which includes the cost of land acquisition, construction and site improvements. *Id.* § 1749 c (c). Included within the definition of a qualified "educational institution" which could apply for federal loans is "any agency, public authority, or other instrumentality of any State established for the purpose of providing or finding housing or other educational facilities for students or faculty of any public educational institution ***". *Id.* § 1749 c (b)(4).

3. The Higher Education Facilities Act of 1963, 20 U.S.C.A. § 701 (Supp. 1965) *et seq.* is designed to aid the nation's colleges and universities and other institutions beyond the high school level through federal grants and loans in building facilities in the nature of libraries, laboratories, classrooms and uses accessory thereto. It is provided that any state desiring to participate in the grant program designate or establish a state agency to process applications for grants. 20 U.S.C.A. § 715.

4. A payment by the State of funds to such an authority without specific appropriations therefor would probably violate *N.J. Const.* (1947) *Art.* VIII, *Sec.* II, *para.* 2, providing that "no money shall be drawn from the State Treasury but for appropriations made by law." *cf. New Jersey Turnpike Authority v. Parsons, supra,* at 247, 248, and compare N.J.S.A. 27:12C-32. The validity of State appropriations for the purpose of the proposed State Dormitory Authority are discussed *infra.*

5. In a dissenting opinion in the *McCutcheon* case, Justice Jacobs, with whom Justice (now United States Supreme Court Justice) Brennan concurred, reached the conclusion that the Act was not unconstitutional. It was emphasized that the future rent did not constitute a presently existing debt or liability, that the only liability of the State, as distinguished from the Authority, occurs when the State actually enters into leases with the Authority and the nature of such obligation could be ascertained only by an examination of the terms of the lease, and that the constitutional provision did not encompass future debts or liabilities. It was also felt that there was a cogent analogy to the Turnpike Authority and the New Jersey Highway

Authority. The opinion was further expressed that ". . . if the State were to insist that all future leases with the Authority contain provisions authorizing the State to vacate at will and thus terminate the leases, it would appear beyond peradventure that the State would incur no obligation thereon except to pay for current use through current appropriations. We assume that the propriety of incurring such obligation would be acknowledged universally." 13 N.J. at p. 73-74.

October 8, 1965

MR. JOSEPH F. REGAN
Commissioner of Registration
Bergen County Board of Elections
Bergen County Court House
Hackensack, New Jersey

FORMAL OPINION 1965—NO. 3

Dear Mr. Regan:

You have requested our opinion as to whether a registered voter who does not vote at any election during four consecutive years except at a school election must re-register before being allowed to vote at any subsequent election.

In our opinion, a registered voter who has not voted at any election except at a school election during four consecutive years must re-register in order to vote at any subsequent election.

The last paragraph of N.J.S.A. 19:31-5 provides that if any registered voter "does not vote at any election during 4 consecutive years his original and duplicate permanent registration and record of voting forms shall be removed to the inactive file and he shall be required to register before being allowed to vote at any subsequent election." N.J.S.A. 19:1-1 defines election as follows: " 'Any Election' includes all primary, general, municipal and special elections, as defined herein."

The latter statute in turn defines "general election" as meaning the annual election to be held on the first Tuesday after the first Monday in November and "primary election" as meaning the procedure whereby political party members nominate candidates to be voted for at general and party elections. It is obvious that a school election falls into neither of these categories.

A "municipal election" is defined by N.J.S.A. 19:1-1 as "an election to be held in and for a single municipality only, at regular intervals". The same statute defines "municipality" as including "any city, town, borough, village, or township." In New Jersey, school districts of every classification, whether or not they are coterminous with municipal boundaries, are and have been local government units governed by a board of education. As such, they are legal entities separate and distinct from the municipality. See R.S. 18:7-82; 18:6-49 *et seq.*; *Board of Education of the City of Hackensack v. City of Hackensack,* 63 N.J. Super. 560 (App. Div. 1960); *George W. Shaner & Sons v. Bd. Ed. Millville,* 6 N.J. Misc. 671 (Sup. Ct. 1928); *Merrey v. Bd. Ed. Paterson,* 100 N.J.L. 273 (Sup. Ct. 1924); *Bd. Ed. Long Branch v. Bd. of Commissioners, Long Branch,* 2 N.J. Misc. 150 (Sup. Ct. 1924); *Montclair v. Baxter,* 76 N.J.L. 68 (Sup. Ct. 1909); *Falcone v. Bd. of Ed., Newark,* 17 N.J. Misc. 75 (C.P.