Note from the Attorney General's Office:

1979 Op. Att'y Gen. No. 79-049 was disapproved in part by
1979 Op. Att'y Gen. No. 79-111.

1979 Op. Att'y Gen. No. 79-049 was overruled by
1981 Op. Att'y Gen. No. 81-100.

OPINION NO. 79-049

Syllabus:

A person may serve concurrently as a member of a community board of mental health and mental retardation and as a member of a city board of education.

To: James R. McKenna, Jefferson County Pros. Atty., Stuebenville, Ohio
By: William J. Brown, Attorney General, July 31, 1979

I have received your request for my opinion as to whether it is permissible for an individual to serve concurrently as a member of a city board of education and as a member of a community mental health and mental retardation board (648 Board).

A person may be barred from holding two public offices either because of an express statutory prohibition or because of the application of the common law doctrine of incompatibility.

The only statutory rules of incompatibility concerning either of these two

public offices are found in R.C. 3313.13 (no school board member may concurrently serve as county prosecutor, city solicitor, or as an official acting in a similar capacity) and R.C. 3313.70 (no school board member is eligible for appointment as school physician, dentist, or nurse).

There being no statutory disqualification applicable to the present situation, consideration must be given to the common law to determine compatibility. The common law test of incompatibility, as set forth in State ex rel. Attorney General v. Gebert, 12 Ohio C.C. (n.s.) 274, 275 (C.C. Franklin Co., 1909), states that: "[o]ffices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both." Since neither position is full time, there is no per se impossibility of performance of the duties of each office. The rationale for requiring compatibility is stated in State ex rel. Baden v. Gibbons, 17 Ohio Law Abs. 341, 344 (Ct. App. Butler Co., 1934),

> It has long been the rule in this state that one may not hold two positions of public employment when the duties of one may be so administered and discharged that favoritism and preference may be accorded the other, and result in the accomplishment of the purposes and duties of the second position, which otherwise could not be effected. To countenance such practice, would but make it possible for one branch of government or one individual to control the official act and discretion of another independent branch of the same government or of interlocking governments which are constructed so as to operate in conjunction with each other. If the possible result of the holding of two positions of public trust leads to such a situation, then it is the rule, both ancient and modern, that the offices are incompatible and are contrary to the public policy of the state.

The principle requiring compatibility of office presumes that both offices are public in nature and that offices rather than employment are involved. The test for determining whether a position is a public office has been stated as follows:

> The chief and most decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political, or governmental functions, then the position is a public office and not an employment. State ex rel. Landis v. Commissioners, 95 Ohio St. 157, 159 (1917). See also Pistole v. Wiltshire, 22 Ohio Op. 2d 464 (C.P. Scioto Co., 1961); State ex rel. Louthan v. Taylor, 12 Ohio St. 130 (1861); 1972 Op. Att'y Gen. No. 72-014.

It has been determined that school board members are public officers. Cline v. Martin, 94 Ohio St. 420 (1916); Schwing v. McClure, 120 Ohio St. 335 (1929). The duties of the 648 Board and the degree of discretion vested in such board members under R.C. Chapter 340 makes it clear, as well, that the 648 board members are public officers in accordance with the test stated above. Both being public offices, I must then examine whether one position is subordinate to the other or a check upon the other.

The duties of the 648 Board are set forth in R.C. 340.03 and include, inter alia, the following:

> [T]he community mental health and retardation board, with respect to its area of jurisdiction . . . shall:
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> (A) Review and evalutate community mental health and retardation services and facilities and submit to the director of mental health and mental retardation, the board or boards of county commissioners, and the executive director of the program,

recommendations for reimbursement from state funds as authorized by section 5119.62 of the Revised Code and for the provision of needed additional services and facilities with special reference to the state comprehensive mental health plan;

(B) Coordinate the planning for community mental health and retardation facilities, services, and programs seeking state reimbursement;

(C) Receive, compile, and transmit to the department of mental health and mental retardation applications for state reimbursement;

(D) Promote, arrange, and implement working agreements with social agencies, both public and private, and with educational and judicial agencies;

(E) Enter into contracts with state hospitals, other public agencies . . . and other private or voluntary non-profit agencies for the provision of mental health and mental retardation service and facilities. . . .

It is clear from the above-cited statute that the 648 Boards review and evaluate community services, which could include services provided by city schools and make recommendations for state funding to county commissioners and to the Director of Mental Health and Mental Retardation. In addition, the 648 Boards promote, arrange and implement working agreements with educational agencies and may enter into contracts with public agencies, including school boards, for the provision of services and facilities.

This overlap of duties between the two positions requires analysis of the possibility of incompatibility because the law is reluctant to allow one officer to be an "inspector of his own books." To do so "would be to convert the very checks and safeguards which the law provides against fraud and peculation into potent instruments of corruption and iniquity," State ex rel. Louthan v. Taylor, supra, at 135. However, in certain circumstances, a potential conflict is too remote and speculative to be controlling. See 1970 Op. Att'y Gen. No. 70-169 and 1971 Op. Att'y Gen. No. 71-081. In the latter Opinion I noted that where there was no possible direct control by one office over the other and where possible conflicts were remote and speculative the common law test of incompatibility is not violated. The instant case is such a case, especially since budget controls are vested in the Ohio Department of Mental Health and Mental Retardation and the county commissioners, and not in the 648 Board and since there is no indication in the relevant statutes that the 648 Boards are to serve as a check on the boards of education.

The mere fact that the 648 Board might review and evaluate school board services to the mentally ill and mentally retarded is not decisive on the issue of a superior/subordinate relationship, especially since the county commissioners and the state make funding decisions. R.C. 340.03. The fact that one office might be required to report to the other, standing alone, is not decisive on the issue of subordinancy. If the other office must approve the report of the first, however, that is an indicium of superiority, and, therefore, incompatibility. 1973 Op. Att'y Gen. No. 73-064. There is no indication from the statutes that, except for possible contractual relationships, the 648 Boards approve actions of city school boards. Any such superior/subordinate relationships that do develop are remote and incidental to the respective primary functions of 648 Boards and city boards of education. Thus, neither position can be said to be superior to, nor a check upon, the other.

Also, the case at hand is distinguishable from 1945 Op. Att'y Gen. No. 104, p. 56, where it was held that, based on GC §5625-1 et seq. (now R.C. Chapter 5705), the offices of members of a city board of education and county commissioners were incompatible because the two entities were in direct competition for the same public funds. There is no such direct conflict in the instant case. Therefore, it is my opinion that there was no intent by the General Assembly to make the 648 Boards a direct superior of boards of education and there is no inherent incompatibility between the two offices.

I would suggest, however, that a member of a 648 Board abstain from voting on matters involving any contractual relationships or working agreements between the Board and the city board of education of which he is also a member in order to avoid any appearance of impropriety.

In light of the foregoing, it is my opinion, and you are advised, that a person may serve concurrently as a member of a community board of mental health and mental retardation and as a member of a city board of education.