

- SCHOOLS: (1) Persons over 20 years of age not entitled to gratuitous instruction.
- (2) Board of directors may provide for persons between 5 and 6 and over 20 years of age and pay tuition just so long as it is ^{not} paid out of funds derived by virtue of Section 6, Article XI, of the Constitution of Missouri.

October 30, 1934.

11-9



Hon. Alvin H. Juergensmeyer
Prosecuting Attorney
Warren County
Warrenton, Missouri

Dear Sir:

This is to acknowledge your letter dated October 20, 1934, as follows:

"The question has arisen whether a pupil who is past 20 years of age is entitled to free tuition under the High School law that requires the district to pay tuition for resident pupils who attend High School in another district. The new law does not say anything about age, yet the old law places the age limit from 6 to 20 inclusive. Also there is another section which provides that districts in some instances may pay the expenses of children under 6 and over 20 years of age. Could that section apply in the case of High School Tuition."

I.

Section 1, Article XI, of the Constitution of Missouri, provides:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years."

At an early date, namely, in 1895, the appellate courts of this State have held that unless one be within the age limit of the above section of the Constitution such was not entitled to attend the public school at the expense of the public school fund. Such was the holding of the St. Louis Court of Appeals in the case of Rogers v. McCraw, 61 Mo. App. 407, and as it is a short opinion we quote same in its entirety as follows:

"This is an action for damages against the defendants, who are directors of a school district, for refusing to allow the plaintiff to attend a public school in the district. The petition states that school was taught in the district from September, 1892, to February, 1893; that the plaintiff became a resident of the district in October, 1892; that, at that time, the plaintiff was over the age of six years and under twenty-one years, and that the defendants, acting as directors aforesaid, wrongfully, willfully, maliciously and illegally made and enforced an order prohibiting the plaintiff from attending the school.

"The court sustained a demurrer to the petition and final judgment was rendered thereon, the plaintiff having refused to amend the pleading.

"The action of the court sustaining the demurrer must be affirmed. The school age as fixed by the constitution is between the ages of six and twenty years. (Constitution, article 11, section 1.) Section 6, of the same article declares that the public school fund 'shall be faithfully appropriated for establishing and maintaining the free public schools * * * in this article provided for, and for no other uses or purposes whatsoever.'

"To entitle the plaintiff to maintain the action, she must have been within the school age (as fixed by the constitution) at the time she was prohibited from attending the school. Roach v. Board of Public Schools, 77 Mo. 484. This is one of the essential facts of her alleged cause of action. Under the code every constitutive fact must be distinctly set forth in the petition; otherwise it is the subject of demurrer. The averment is that at the time the plaintiff was excluded from the school 'she was over six and under twenty-one years of age.' It is manifest that the petition failed to state a cause of action.

"There are other objections urged against the petition, which we need not discuss.

"With the concurrence of the other judges the judgment of the circuit court will be affirmed. It is so ordered."

From the above it is our opinion that the board of directors cannot pay the tuition of a pupil past twenty years of age out of the public school fund even though Section 16, Laws of Missouri, 1933, page 393, requires the board of directors to pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school of said district and attends an approved high school in another district, because of Section 6, Article XI, Missouri Constitution.

II.

In 1913, Laws of Missouri, 1913, page 717, present Section 9213 was enacted, which is as follows:

"The board of directors or board of education of any school district in this state may provide for the gratuitous education of persons between five and six and over twenty years of age, resident in such school district. Such gratuitous education,

"however, shall be provided only out of revenues derived by such school district from sources other than those described in section 6, article XI of the Constitution of this state, and only with so much of such revenues as are not required for the establishing and maintaining of free public schools in such school districts for the gratuitous instruction of persons between the ages of six and twenty years: Provided, that nothing in this section shall be construed as affecting the basis of apportionment of the public school fund of this state as now fixed by law."

You will note from reading the above section that "the board of directors or board of education of any school district in this state may provide for the gratuitous education of persons between five and six and over twenty years of age, resident in such school district." Your attention is invited to the word "may" and also directed to the fact that a pupil may be between five and six years of age and over twenty years of age and, yet, if the board of directors provide to teach such pupils gratuitously, then such is left to their discretion. However, in view of the constitutional provision, namely, Section 6, Article XI, the board of directors may not use any part of the public school fund provided for therein for the purpose of giving gratuitous education to such persons not between the constitutional ages provided in Section 1, Article XI, supra.

Section 6, Article XI, of the Constitution, provides in part as follows:

"* * *; the annual income of which fund, together with so much of the ordinary revenue of the State as may be by law set apart for that purpose, shall be faithfully appropriated for establishing and maintaining the free public schools and the State University in this article provided for, and for no other uses or purposes whatsoever."

In *Lincoln University v. Hackmann*, 243 S. W. 320, the Supreme Court of Missouri, en Banc, said the following (l. c. 322):

"It is thus seen that the income from the public school fund and the money required to be set apart from the ordinary revenue of the state must be devoted exclusively to the support of the public schools. To this there is only one exception, the State University. So that when the Legislature set apart one-third of the ordinary revenue of the state for the support of the public schools, that fund, together with the annual income from the public school fund, was devoted to the purpose designated by the Constitution, and the Legislature was without power to divert or appropriate any portion thereof to any use or purpose other than establishing and maintaining the free public schools and the State University."

From the above it is our opinion that if the board of education provides gratuitous instruction for persons between five and six and over twenty years of age, resident in such school district, then the school board may not use any of the funds derived by virtue of Section 6, Article XI, of the Constitution of this State. It therefore follows that Section 9213, supra, does not give the board of directors the right to pay tuition of students attending high school in another district from funds, if any, derived from the state by virtue of Section 16, supra. And if the board of directors pay the tuition of any such pupil then it must be paid from sources other than those received by the school district by virtue of Section 6, Article XI, supra.

Yours very truly,

James L. HornBostel
Assistant Attorney-General.

APPROVED:

ROY McKITTRICK
Attorney-General.

JLH:EG