

SCHOOLS: When state aid may be allowed.

August 18, 1941



Honorable Lloyd W. King
Superintendent
State Department of Public Schools
Jefferson City, Missouri

Dear Mr. King:

This Department is in receipt of your request for an official opinion, which reads as follows:

"In the light of the provisions of the laws governing the distribution of state school money and the recent decision of the Supreme Court, as indicated herein, I shall appreciate your advice and official opinion in answer to the following questions:

"1. Would the existence of any one or all of the following practices, permitted or authorized by the school board, eliminate a school district from qualifying for the distribution and use of public school funds for such units or parts of the school program in which these practices exist:

"a. The attendance of pupils at mass or the giving of any other religious instruction during the school day and under the jurisdiction of school teachers.

"b. The segregation in separate buildings or quarters of school children according to religion.

"c. The employment, as teachers, of Sisters, or others whose special religious vows prevent them from giving secular instruction with complete religious freedom.

"d. The assignment of teachers by some authority other than the school board, even though the board accepts such assignments and contracts for the payment of the salaries of such teachers.

"e. The display or use in the quarters of the school of any books, symbols, or tracts representing, or calculated to teach the pupils, any creeds, tenets, or beliefs of any sect or denomination.

"2. On whom rests the responsibility for determining the units or parts of a school program on which a district is entitled to the apportionment of state school funds?

"3. In determining the August 15, 1941, apportionment, and those of succeeding years, is it mandatory that the State Superintendent of Public Schools accept the certification of applications of boards of education by a County Clerk as sufficient evidence of the existence of free public schools in the county and their eligibility to receive state school money?

"4. If the County Clerk's certification of public schools is accepted for the distribution of state school money on August 15 and it is later determined that some of the school districts to which the apportionment was made did not qualify for the apportionment for all or a part of the units of the school program, what will be the proper course of action?

"5. What action shall be taken by the State Superintendent of Schools on this August 15 with respect to the apportionment of state school money to the District of Meta, or any other public school district in which similar conditions obtain.

"7. What is the present effect of the decision of the Supreme Court of Missouri in Case No. 37,264 (Harfst, et al., Appellants, v. Hoegen, et al., Respondents), upon the apportionment and distribution of the state school money on August 15 next; and should such decision be taken into account in making such apportionment?"

The decision referred to in your request is that of Harfst v. Hoegen (No. 37264, not yet officially reported), which was recently decided by the Supreme Court of Missouri. However, a motion for rehearing has been filed in this case and two motions to intervene have been allowed. Therefore, the decision is not final and it is not the law as yet in this State. However, what is said in that case would be highly persuasive upon any question which involves like facts. The Harfst Case involved the question of whether a certain school was a "public school" so as to be entitled to state aid. The school was owned by the Catholic Parish of St. Cecelia and was rented to the school district. The teachers were Sisters of the Most Precious Blood, a Catholic teaching order. The Nuns were hired by the school board of the district as teachers.

The facts in the case as shown by the opinion were as follows:

"We find the usual school day commencing with prayer in the morning. After prayer the pupils are marched, one room at a time, to the Catholic church next door for Holy Mass. After Mass the pupils are marched back to their school rooms where they receive religious instruction. In this they study the Catholic catechism and the child's Catholic Bible. On one or two days of each week the parish priest gives religious instruction to the pupils in the midmorning, either at the church or in the schoolhouse chapel. On Friday afternoons the pupils are again marched to the church for confession. In the quarterly 'Teacher's Report to Parents' the subject 'Religion' is included under 'Branches Pursued' and a grade in this subject is given to each pupil."

The court under the above set of facts held that the school was not a "public school" and therefore not entitled to state aid. Further reference will be made to this opinion in answering the questions submitted in your letter.

Your questions will be answered in their numerical order.

A

"The attendance of pupils at mass or the giving of any other religious instruction during the school day and under the jurisdiction of school teachers."

It must be born in mind that this question relates to the distribution of funds to schools under Article XI, Sections 1 to 11, inclusive, of the Constitution of the State of Missouri. Section 1 refers to the duty of the General Assembly to establish and maintain free public schools for the gratuitous instruction of all persons in the state between the ages of six and twenty. Section 11 refers to religious or sectarian schools and prohibits public funds to be paid to them, said section being as follows:

"Neither the General Assembly nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State, or any county, city, town or other municipal corporation, for any religious creed, church or sectarian purpose whatever."

By Section 10337, R. S. Mo. 1939, care, control and equipment of a school is under the control of the Board of Directors. Said section contains further provision to the effect that the board may allow the free use of the school buildings and grounds for the free discussion of public questions or subjects of general public interest, for the meeting of organization of citizens, or for such other civic, social or educational purposes as will not interfere with the prime purposes to which such buildings and grounds are devoted; and further provides that the annual or special meeting for any of the above mentioned purposes may, by a majority vote of the qualified voters, be prohibited.

There is another section relating to the annual meetings of the common school district. The fifth provision of the powers of the voters at the annual meeting under Section 10419, R. S. Mo. 1939, is as follows:

"To determine, by majority vote, whether or not the schoolhouse of the district may be used during the ensuing year for religious, literary or other purposes, or for the meeting of farmer or labor organizations, secret or otherwise."

The provisions of Section 10362, R. S. Mo. 1939, are to the effect that the school day shall consist of six hours,

occupied in actual school work, and the school week shall consist of five days. It is conceded by numerous authorities that the teaching of any form of religion in the public schools during the school hours, irrespective of the sect of the religion taught, whether it be Catholic, Quaker, Lutheran, Mormon, Baptist, Presbyterian, or other forms of Protestant religion, is prohibited. Knowlton v. Baumhover, 182 Iowa 691; Hysong v. Gallitzin School District, 164 Pa. 629; Gerhardt v. Heid, 66 N. D. 444.

We are, therefore, of the opinion that the conducting of mass or the giving of any other religious instruction during the school day is prohibited.

We shall next consider the question of such religious instruction not conducted during the school hours and not in conjunction with the general diffusion of knowledge and intelligence as contemplated by the Constitution.

The courts of Missouri have never passed directly on this phase of religious teaching in our schools. However, the question was directly before the Supreme Court of Indiana in State ex rel. Johnson v. Boyd, 28 N. E. (2d) 257, 1. c. 266, and the court said:

"The appellants also contend that it is significant that each morning, immediately prior to the beginning of school, the pupils were caused to attend at the nearby Roman Catholic Church where they were given religious instructions for thirty minutes by the Parish Priests. The findings do not disclose by whom the children were 'caused' to attend. The finding does disclose that the service was said to be voluntary. Since the children in question were children of Catholic parents and the service was voluntary and not within the school hours we fail to see that this amounts to sectarian teaching within the schools or that it could be held to make the schools parochial schools rather than public schools."

In the decision of *Dritt v. Snodgrass*, 66 Mo. 286, the question arose as to the power of the board to make and enforce needful rules and regulations for the government and management of the school. As to the authority of the parent and the teacher in reference to a pupil, the court said (l. c. 298):

"* * * which every child within school age has a right, under the law, to attend, subject while so attending to be governed by such needful rules as may be prescribed. When the school room is entered by the pupil, the authority of the parent ceases, and that of the teacher begins; when sent to his home, the authority of the teacher ends, and that of the parent is resumed. For his conduct when at school, he may be punished or even expelled, under proper circumstances; for his conduct when at home, he is subject to domestic control * * *"

In view of the authorities mentioned above we are of the opinion that the attendance at mass or other religious instructions by pupils outside of school hours, would not constitute the maintaining of a sectarian school within the meaning of the Constitution.

B.

"The segregation in separate buildings or quarters of school children according to religion."

From a reading of your second question, we infer that you refer to the practice cited in the recently decided case of *Harfst v. Hoegen* (No. 37264), wherein a school district had two schools and the directors of the district had made it a rule requiring all Catholic students to attend the school taught by Nuns, while the Protestant children were required to attend the other school. Judge Douglas in speaking for the court said:

"The segregation of Catholic from the non-Catholic children and their mandatory attendance at one or the other of the two grade schools according to their religion, whether the schools be of equal or of unequal facilities, likewise constitutes a denial of complete religious freedom."

In view of the above statement, we believe that a school board is forbidden to segregate in separate buildings or quarters school children according to their religion.

C

"The employment, as teachers, of Sisters, or others whose special religious vows prevent them from giving secular instruction with complete religious freedom."

At the outset we wish to point out that this Department has made inquiry as to the vows taken by "Sisters" of the Catholic Church, and we find nothing therein that prevents them from giving secular instruction with complete religious freedom. From the information that we have obtained the only vows that nuns are required to take are those of poverty, chastity and obedience. However, answering your question, we are of the opinion that if any teacher of a public school has taken a religious vow which prevents the giving of secular instruction with complete religious freedom, then such teacher may not be employed as an instructor in the public schools.

In the case of McDowell v. Board of Education, 172 N. Y. S. 590, it was held that a schoolteacher who was a Quakeress was properly dismissed, not because of her religion, but because of certain views and beliefs which she declared were based on her religion, which prevented her from properly discharging the duty she had assumed, in that she was opposed to war, and to the existing war with the German government, would not uphold this country in forcibly resisting invasion, would not help, or urge her pupils to help, the United States government in carrying on the war with Germany, or to perform

Red Cross services, or to buy thrift stamps, and did not believe that a teacher was under special obligation to train her pupils to support the government of the United States in its measures for carrying on the war.

Therefore, we rule that if any person has taken a vow which prevents the giving of secular instruction with complete religious freedom, such person should not be employed as a teacher, and if employed the school is not a "public school" within the meaning of the Constitution and is not entitled to state aid.

D

"The assignment of teachers by some authority other than the school board, even though the board accepts such assignments and contracts for the payment of the salaries of such teachers."

As heretofore stated, the control and management of the school is under the authority of the school board, the hiring of teachers, the maintenance of the buildings, and all other necessary elements which are essential in carrying on a public school. The school board must in effect hire and make contract with the teacher, and should not be mere puppets, nor should the Constitution be circumvented by permitting others to select the teacher for the board on religious grounds, acquiesce or approve same. In this regard, we therefore again refer you to the case of State ex rel. Johnson v. Boyd, supra, in which the point was raised that the teachers employed by the school trustees were recommended for such positions by the authorities of various Catholic colleges. The court said (l. c. 265):

"The fact that these teachers were recommended by various Catholic normal schools can not be considered an important factor. The teachers were employed by the Board of School Trustees. They were chosen from persons regularly qualified and licensed to teach school agreeable to the laws of the State of Indiana. It is the duty of school trustees to investigate the character and fitness of teachers.

The trustees may do this in any proper manner which they may choose, including the procuring of recommendations. Recommendations from any reliable normal college should be helpful. The choice of teachers is within the discretion of the school trustees and unless such discretion be abused the courts will not interfere. * * *

Therefore, it is our opinion that the employment and assignment of teachers is under the exclusive control of the school board and no other person or group has the right or authority to select the teacher of a public school. But, the mere fact that the teachers are recommended by some third person or group does not vitiate the contract of employment, if in truth and fact the school board itself actually employs the teacher.

E

"The display or use in the quarters of the school of any books, symbols, or tracts representing, or calculated to teach the pupils, any creeds, tenets, or beliefs of any sect or denomination."

In view of our holding to question "A," to the effect that any religion, irrespective of sect or denomination, cannot be taught in the schools during school hours, we are of the opinion that books, symbols, tracts, fonts, cannot be displayed or used in the schools. In the Harfst case the chancellery court enjoined the use or display of such matters in the school room. His action in so enjoining was approved by the Supreme Court. Therefore, we approve and adopt that view in this opinion and rule that the display or use of any symbols or tracts representing any creeds, tenets or beliefs of any sect or denomination in a public school, is illegal and such books, symbols, etc., should be removed.

Therefore, in summation, we are of the opinion that in answering your questions A, B, C, D and E, that the existence

of any one or all of the conditions wherein we have held that they should not exist, would eliminate the school district from qualifying for the distribution and use of public funds.

F

"On whom rests the responsibility for determining the units or parts of a school program on which a district is entitled to the apportionment of state school funds?"

Section 10390, R. S. Mo. 1939, provides in part as follows:

"The state superintendent of public schools shall, annually, before August 15th, apportion the public school fund applied for the benefit of the public schools in the manner provided by law.
* * * * *"

The statute then sets forth the different sums of money that shall be apportioned to the various districts, and provides further as follows:

"* * * The clerk of each school district shall make a report to the county clerk between June 15th and June 30th of each year, showing the number of teachers employed, the total number of days' attendance of all pupils, the length of the school term, the average attendance, the number of days taught by each teacher, the salary of each teacher, and any other information that the state superintendent may require. The aforesaid report shall be sworn to before a notary public or the county clerk. The county clerk shall make a summary of all these reports and forward to the state superintendent of public schools, on or before July 15th, a report

showing the total number of teachers employed in the county, and the total number of days' attendance of all pupils in the county, the number of teacher employed for the full term and the number for half terms, and the number whose salary is one thousand dollars or more per year, and such other information as the state superintendent may require. Any district clerk, county clerk, or teacher, who shall knowingly furnish any false information in such reports, or neglect or refuse to make aforesaid report, shall be deemed guilty of a misdemeanor and punishable by a fine not exceeding five hundred dollars or imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment. * * * * *

Under the provisions of the above statute the duty is imposed upon the clerk of the school district and the county clerk to obtain the necessary information upon which the apportionment is made and it is made a criminal offense knowingly to furnish any false information in such reports. As will be shown in the answer to the next question, the State Superintendent must accept these reports as true and cannot question their authenticity or accuracy. Therefore, it is the opinion of this Department that the responsibility of determining the unit of a school district which is entitled to apportionment of state school funds, rests upon the clerk of the school district and the county clerk.

G

"In determining the August 15, 1941 apportionment, and those of succeeding years, is it mandatory that the State Superintendent of Public Schools accept the certification of applications of boards of education by a county clerk as sufficient evidence of the existence of free public schools in the county and their eligibility to receive state school money?"

Section 10390, R. S. Mo. 1939, has been quoted in full in the preceding paragraph and we do not deem it necessary to quote this statute again.

Section 10393, R. S. Mo. 1939, provides as follows:

"The state superintendent of public schools is hereby authorized to correct any error made in the apportionment of the public school funds among the various counties of this state out of the public school fund of the year next following the date when such mistake was made, and the amount set apart to any county for the purpose of correcting an error shall be by him certified to the state auditor and to the county clerk, and the state auditor shall draw a warrant on the state treasurer for the amount so certified in favor of the treasurer of said county, and the county clerk shall apportion said funds to the various districts in said county as the funds of the year in which said error occurred, and the county treasurer may pay outstanding warrants for teachers' wages issued during the school year in which said error occurred, not to exceed the correction made."

Section 10599, R. S. Mo. 1939, sets forth the powers and duties of the state superintendent of public schools and provides in part as follows:

"* * * He shall exercise such supervision over the educational funds of the state as may be necessary to secure their safety and correct application and distribution according to law.* *"

In the case of State ex rel. Randolph County v. Evans, 240 Mo. 96, the Supreme Court of Missouri had before it the question of whether the state superintendent of public schools could attack the truthfulness or correctness of the enumeration made in the manner prescribed by statute of the children

within a school district. The court, through Judge Graves, said:

"If these enumerations are fraudulent no doubt they could be attacked and corrected in a proper action, but so long as they exist the State Superintendent cannot reach them in this collateral proceeding. Until they are corrected in a proper proceeding he must take them as a basis for a proper distribution of the school money. This view of course disposes of the enumerations for all the years, and in effect disposes of the case, but there are other matters urged by the motion to strike out which we prefer to discuss, and these we take next.

"But to my mind there is another reason why the contention of respondent Evans cannot be sustained. His duties as to the distribution of school funds are purely ministerial. No statute authorizes the State Superintendent to revise and correct enumerations on the ground of fraud. Such officer has been furnished with no legal machinery by which he can hold or have a hearing and adjudge the fact of fraud or no fraud in enumeration returns. He is not empowered to bring the interested parties before him. In fact the law makes no provision for him to make an investigation of the question of fraud. As indicated in the previous paragraph, I have no doubt that in a proper proceeding before a proper tribunal, with the proper parties before such tribunal, fraudulent enumeration lists may be purged of fraud, but the State Superintendent has not been constituted such a tribunal by law."

This case, although decided under statutes which are not identical with those in effect today, still deals

with the procedure that is to be followed in the apportionment of state school funds, and we believe authority in answer to the question presented above. The case further points out that Section 10393, supra, relating to the correction of errors by the state superintendent in the apportionment, applies only "when he has apportioned to a county less than that was due it."

Therefore, it is the opinion of this Department that it is mandatory that the state superintendent of public schools accept the applications of boards of education as true and that he cannot question the correctness of the application because he has no discretion in this matter and his duties are purely ministerial.

H

"If the county clerk's certification of public schools is accepted for the distribution of state school money on August 15 and it is later determined that some of the school districts to which the apportionment was made did not qualify for the apportionment for all or a part of the units of the school program, what will be the proper course of action?"

As pointed out in the Evans case, supra, and as will be noted from reading Section 10390, supra, criminal prosecution has been provided for and it is our opinion that this is the proper procedure to follow if the county clerks or the clerks of the respective districts have made false reports stating that certain districts have a certain number of teachers and pupils attending the public schools in that district. Furthermore, a civil action could be instituted against the school to recover the money received by them to which they were not legally entitled.

I

"What action shall be taken by the state Superintendent of Schools on this August

15 with respect to the apportionment of state school money to the District of Meta, or any other public school district in which similar conditions obtain?"

As pointed out in our answer to question "G", the state superintendent, in making the apportionment of state school money, acts in a ministerial capacity and it is mandatory that he make the apportionment according to the certification and application of the clerk of the county court.

J

"What is the present effect of the decision of the Supreme Court of Missouri in Case No. 37,264 (Harfst, et al., Appellants, v. Hoegen, et al., Respondents), upon the apportionment and distribution of the state school money on August 15 next; and should such decision be taken into account in making such apportionment?"

The recent opinion of Harfst v. Hoegen, as stated above, is not yet final, there being a motion for rehearing now pending, and therefore this case should not be taken into consideration in the apportionment and distribution of state school money on August 15th. Moreover, as pointed out in answer to questions "G" and "I," the state superintendent of public schools cannot question the application and certification but must make the apportionment according to the figures presented in such application and certification.

Respectfully submitted,

ARTHUR O'KEEFE
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